Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MARLENE WHITTIER,
Petitioner,

v.

DANIEL KOBAYASHI, ERIC GOLDSTEIN,
ERIK PALACIO, ANDRE BRUNA, SEAN VISNERS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether in light of the precedents of this Court and the rulings of many other Circuits it is clearly established law that the suspicion of drugs and weapons in the home does not create a blanket exception excusing police from the Fourth Amendment requirement of knocking and announcing before entering a residence.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding are: Petitioner, Marlene Whittier, an individual; and Respondents, Daniel Kobayashi, Eric Goldstein, Erik Palacio, Andre Bruna and Sean Visners, all individuals.

Pursuant to Supreme Court Rule 29.6, petitioner states that there are no parent companies or non-wholly owned subsidiaries involved in this case.

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JURISDICTION

The three essentially identical per curiam opinions of the court of appeals were all entered on August 31, 2009. The denials to rehear en banc were entered on November 13, 2009; November 9, 2009; November 9, 2009. The jurisdiction of this Court is invoked pursuant to 18 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution, which states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

> violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. The Events of August 5, 2005

During the early morning hours of August 5, 2005, 23-year old Anthony Diotaiuto ("Anthony") died from fatal gunshot wounds inflicted by the City of Sunrise Officers who had burst into his home. Anthony held down two jobs, helped support his mother, and attended community college. He and his mother had just purchased the home they lived in. Anthony had only a single mark on his record – a nonviolent marijuana possession misdemeanor accrued when he was sixteen.

A search warrant had been issued on the suspicion that Anthony was selling drugs from his residence. (App. A-4). Officers contended they loudly knocked and announced before entering, but this is disputed. (App. A-4–5). Neighbors said that they did not hear the police knock and announce; even three who stated that they were listening and certainly would have heard the alleged knock and announce said that they never heard this. (App. A-5) Furthermore, the police used an entry technique that is used only when there is the element of surprise; knocking and announcing would eliminate any

surprise before the entry.

The officers knew that Anthony had no record of violence. Moreover, a confidential informant specifically told the detective in charge of the underlying investigation that he knew Anthony well and did not think that Anthony would resist an arrest. As the officers approached Anthony's home, they had every reason to believe he was sleeping. The entry occurred at six in the morning and surveillance of the home revealed no lights or activity emanating from the home for over an hour prior to entry.

The only factor indicating any possible peril to the officers was their knowledge that Anthony lawfully owned both a properly licensed handgun and a shotgun (which did not require a license). On instruction by Sgt. Kobayashi, Officers Eric Goldstein and Erik Palacio forced Anthony's door with a Halligan tool and a battering ram. (App. D-6). Officer Andre Bruna then threw a flash-bang distraction device which detonated about six feet away from Anthony, who stood in the first room of the house (wearing only boxer shorts). (App. D-7). Anthony appeared shocked and disoriented. Sgt. Kobayashi entered the home simultaneously with Officer Kevin McDonnell and commanded Anthony to "get on the ground." *Id.* Officer Sean Visners did not give any commands so as not to add to what he described as the "chaos." Officer Palacio also observed Anthony facing the door looking stunned and frozen.

Anthony fled into his bedroom, pursued by Officers Visners and Bruna. (App. D-7). According to police, Anthony then retrieved his licensed handgun from his closet. *Id.* Officers Visners and Bruna opened fire and Diotaiuto fell back into the closet. *Id.* Within 15 to 20 seconds of police entering his home, Anthony Diotaiuto lay dead on the floor from approximately 25 gunshot wounds. Anthony did not once fire his own weapon during the entire incident. (App. A-5). The only controlled substance officers found inside the house was a small quantity of marijuana.

Anthony had no reputation for, or history of, violence whatsoever. The officers admitted that he appeared stunned, confused, and frightened. The moment officers breached the door they exposed Anthony to a flash-bang grenade, a device designed specifically to disorient, blind, deafen, and incapacitate combatants. (App. D-2, fn. 2). The officers admitted that the scene was chaotic. Anthony's behavior was consistent with that of a startled, blinded individual in fear for his life, desperately attempting to protect his home and family from unknown intruders. As a result of the very kind of response which would naturally and predictably stem from a no-knock entry, Anthony was shot to death moments later.

The members of the SWAT team were dressed in all black with black helmets. Anthony was asleep and was awakened by someone smashing in the door, throwing a flash-bomb next to him, and by eight people dressed all in black running at him and

shouting over each other. He was dead 15 to 20 seconds later. There was not sufficient time for Anthony to reasonably process what was happening during this chaos. A proper knock and announce was the only thing that could have saved his life under these circumstances.

The officers themselves never claimed that there were exigent circumstances justifying entering without knocking and announcing. They maintained that they had knocked and announced, though as mentioned above, there was strong evidence to the contrary.

B. Proceedings Below

Marlene Whittier, Anthony's mother, brought suit under 42 U.S.C. § 1983 in federal court as the personal representative of Anthony's estate, alleging that the officers violated Anthony's Fourth Amendment rights by forcibly entering without first knocking and announcing their presence and, as a result, shooting and killing him in his home.

The suit named as defendants Sgt. Kobayashi as team leader, Officers Goldstein and Palacio who breached the door, and Officers Bruna and Visners, who shot Anthony to death. Each of the officers made an identical motion for summary judgment on the grounds that no material factual dispute existed as to whether the knock and announce occurred and that they were protected by qualified immunity.

The district court issued three orders denying the motions for summary judgment on the knock and announce question. The district court held that the four subordinate officers did not merit qualified immunity for following their supervising officer's orders and that a material dispute existed as to the knock and announce. (App. D-16, E-17). Similarly, the district court denied qualified immunity on the knock and announce issue for defendant Sgt. Kobayashi, the commanding officers, since no neighbors had heard the knock and announce and three neighbors adamantly held that they were listening and would have heard it had it occurred. (App. F-12). The court also said that there were no exigent circumstances which would have eliminated the knock and announce requirement. (App. D-10, E-8, F-10). The district court also noted that no officers claimed exigent circumstances. (App. D-19, E-16,). The district court denied qualified immunity to the officers on the knock and announce, and the officers took an interlocutory appeal to the Eleventh Circuit. (App. D-16, E-17, F-12). In three per curiam opinions, the Eleventh Circuit reversed the district court and said that it was irrelevant that there was a factual dispute as to whether the police knocked and announced before entering. The Eleventh Circuit said that officers were protected by qualified immunity because the police were justified in entering without knocking and announcing based on their belief that there were drugs and weapons in the house. (App. A-8, B-7, C-7). Although its conclusion was based on qualified immunity, the Eleventh Circuit effectively created a blanket exception to the knock and announce requirement when there is the

"combination of drugs and firearms" based on the fact that "'[g]uns and violence go hand-in-hand with illegal drug operations." (App. A-8, B-7, C-7).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CLEAR SPLIT AMONG THE CIRCUITS, AN APPARENT CONFLICT WITH A PRIOR DECISION OF THIS COURT, AND AN ISSUE OF NATIONAL IMPORTANCE AS TO WHETHER THERE IS A BLANKET EXCEPTION TO THE KNOCK AND ANNOUNCE REQUIREMENT WHEN THE POLICE HAVE REASON TO BELIEVE THAT A WEAPON IS LAWFULLY PRESENT IN A DWELLING WHERE A SEARCH IS TO OCCUR.

A. This Court Should Grant Review To Resolve A Tension Between The Eleventh Circuit's Decision And Prior Rulings Of This Court.

This Court has been emphatic that the Fourth Amendment embodies the constitutional rule that unless there are exigent circumstances, police must knock and announce before entering a dwelling. *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995) (the Fourth Amendment incorporates the common law requirement of the knock and announce). This is based on the importance given to the sanctity and

privacy of the home under the Fourth Amendment. *See, e.g., Kyllo v. United States*, 533 U.S. 27 (2001). Also, as the facts of this case illustrate, the knock and announce requirement provides crucial protection for the safety of both police and residents. When police enter without knocking and announcing, homeowners may well mistake them for dangerous invaders and act in self-defense accordingly.

There is a clear and obvious tension between the Eleventh Circuit's creating a blanket exception to the knock and announce requirement in cases where police believe that drugs and weapons are present, and this Court's decision in *Richards v. Wisconsin*, 520 U.S. 385, 388 (1997). Indeed, the Eleventh Circuit's conclusion of qualified immunity because of the absence of clearly established law is at odds with *Richards v. Wisconsin*. In that case, this Court rejected a blanket exception to knock and announce in all drug felony cases where officers did not possess "specific information about dangerousness, or the possible destruction of drugs in a particular case." *Id.* at 390.

Richards presented a set of facts very similar to the instant case. Officers received a warrant to search the motel room of Steiney Richards for "drugs and related paraphernalia." *Id.* at 388. Officers executed a no-knock entry, and seized drugs from his room. *Id.* at 389. The Wisconsin Supreme Court held that officers were never required to knock and announce where the warrant specified a search for evidence of delivery of drugs or possession with intent to deliver drugs." *Id.* at 390. Such facts, the

Wisconsin Court opined, were sufficient for an unrebuttable presumption of exigency.

The Wisconsin Court looked at criminal conduct surveys, newspaper articles, and other judicial opinions to decide that all felony drug crimes must necessarily involve "an extremely high risk of serious if not deadly injury to the police as well as the potential for the disposal of drugs by the occupants prior to entry by the police" and "concluded that exigent circumstances justifying a no-knock entry are always present in felony drug cases." *Id.* at 390. As the Eleventh Circuit did in the instant case, the Wisconsin Supreme Court created a low and generalized standard for exigency, determining that "police in Wisconsin do not need specific information about dangerousness, or the possible destruction of drugs in a particular case, in order to dispense with the knock-and-announce requirement in felony drug cases." *Id.*

The Eleventh Circuit used essentially identical reasoning in this case to find that the officers were protected by qualified immunity. It concluded that the police were protected by qualified immunity in entering without knocking and announcing not based on any particularized facts, but because there was reason to believe that drugs and firearms were present. (App. A-8, B-7, C-7). However this Court in *Richards* already acknowledged and rejected this very argument, stating that the State's interest in preventing a potential "'convergence in a violent and dangerous form of commerce of weapons and the destruction of drugs'" is insufficient to merit a

blanket exception to knock and announce. *Richards* at 392.

In *Richards*, this Court acknowledged that certain entries searching for drug evidence might rise to the level of exigency; however it emphasized the importance of maintaining a case-by-case analysis. The Court did so for two main reasons, both of which apply to the instant case.

First, this Court expressed concern about the tremendous overinclusiveness of the per se exception adopted by the Wisconsin Supreme Court. This Court recognized that a per se exception encompassed a significant proportion of cases where the government's interest in preserving evidence and officer safety did *not* outweigh the individual interest in privacy. *Id.* at 393. Here, just as in *Richards*, the ruling by the Eleventh Circuit improperly encompasses individuals who would never resist the police, yet own a licensed weapon for any of a number of valid reasons such as self-protection, recreation or hunting.

Second, this Court recognized that allowing a blanket exception based on a criminal category would impermissibly open the door to further categorical no-knock entry rules, allowing the gradual erosion of this important constitutional protection. As this Court stated,"the reasons for creating an exception in one category can, relatively easily, be applied to others." *Id.* at 393-394. This Court explained:

Armed bank robbers, for example,

> are by definition, likely to have weapons, and the fruits of their crime may be destroyed without too much difficulty. If a per se exception were allowed for each category of criminal investigation that included a considerable-albeit hypothetical-risk of danger to officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless. *Id.* at 394.

The Eleventh Circuit applies just this faulty reasoning, not to the category of armed burglars, but to the category of gun owners. This outcome is far more egregious, given the large proportion of legal gun owners in this country and the Second Amendment's protection of this right. As stated in *District of Columbia v. Heller*, the words of the Second Amendment "guarantee the individual right to possess and carry weapons in case of confrontation." 128 S. Ct. 2783, 2797 (2008). In fact, the effect of the Eleventh Circuit's decision is that any person who lawfully exercises his or her Second Amendment right thereby waives the Fourth Amendment's knock and announce protection.

Finally, this Court in *Richards* emphasized the importance of case-by-case analysis due to the heavy burden imposed by a no-knock entry. This Court stated that the intrusion of a no-knock entry could not be considered minimal, stating, "[t]hese interests

are not inconsequential . . . when police enter a residence without announcing their presence, the residents are not given any opportunity to prepare themselves for such an entry." *Richards* at 393. For Anthony Diotaiuto, the consequences were anything but minimal; at the tragically young age of 23 he lost his life.

The Eleventh Circuit's conclusion that the officers are protected by qualified immunity for their conduct cannot be reconciled with *Richard's* express rejection of a blanket exception to the knock and announce requirement. Thus, this Court should grant review on an issue which arises constantly throughout the country: if police believe that a person has a weapon in the home, even one (as in this case) lawfully present, is that sufficient by itself to justify an entry without knocking and announcing? If it is not sufficient, as *Richards v. Wisconsin* indicates, is there clearly established law that the reasonable officer should know?

This Court's reasoning in *Michigan v. Hudson*, 547 U.S. 586 (2006), also clearly establishes that this blanket exception is not permissible and that the Eleventh Circuit erred in finding qualified immunity. In that case, the police executed a search warrant for drugs and firearms on the home of petitioner Booker Hudson. *Id.* at 588. Officers approached the home, entered, and discovered large quantities of drugs, including rock cocaine in the petitioner's pockets. Furthermore, a "loaded gun was lodged between the cushion and armrest of the chair in which he was sitting." *Id.*

Unlike the instant case, in *Hudson*, police knocked and announced their presence, but did not wait before entering. All of the Justices conceded that the police violated the Fourth Amendment. In fact, the Court stated that, "[h]appily, . . Michigan has conceded that the entry was a knock-and-announce violation." *Id.* at 590. The issue was whether the exclusionary rule applied to the fruits of the search.

However, under the Eleventh Circuit's reasoning, the officers would not have violated the knock and announce requirement. In fact, a reasonable officer would not have needed to knock and announce at all, given that their search was for drugs and weapons.

Therefore, this Court's reasoning in *Richards v. Wisconsin* and *Michigan v. Hudson* clearly establishes that the finding of qualified immunity and the blanket exception created by the Eleventh Circuit are inconsistent with the Fourth Amendment.

B. The Eleventh Circuit's Ruling In This Case Is In Direct Conflict With Decisions Of Several Other Circuits And Review Should Be Granted To Resolve This Split On An Issue That Constantly Arises.

The Eleventh Circuit's decision, that the officers' belief that weapons and drugs were present in Anthony's home entitled them to qualified immunity and relieved them of the duty to knock and announce, stands in direct contrast to rulings by the Second,

Sixth, Seventh, Eighth, and Tenth Circuits, creating a significant split among the lower courts. Courts in these circuits consistently require a showing of specific and particularized evidence of officer peril to justify a no-knock entry where weapons are present, and explicitly reject the notion that presence of drugs and weapons is automatically sufficient for entering without knocking and announcing. Without strong evidence of officer peril, shown by a combination of a violent history and circumstances specific to the case showing the suspect's intent to resist, courts in these circuits continue to impose the knock and announce requirement on officers.

This case, where there were absolutely no particularized reasons to believe that officers faced peril, would have come out differently in any of these other circuits. Indeed, the clear and consistent law in these other Circuit, that the presence of drugs and weapons is not by itself sufficient to excuse the requirement for knocking and announcing, is inconsistent with the Eleventh Circuit's conclusion that there is not clearly established law and that qualified immunity is thus permissible.

The Sixth Circuit in *United States v. Nabors,* 901 F.2d 135, 1354-55 (6th Cir. 1990), explicitly held that mere presence of weapons did not rise to the level of exigency, stating, "[w]e do not hold ... that every time law enforcement personnel suspect that the subject of a search warrant possesses a firearm, a split-second announcement followed by a forced entry sufficiently complies with 18 U.S.C. § 3109."

Nabors involved a suspect on probation; officers obtained a warrant to search for weapons and other evidence. *Id.* at 1353. As in the instant case, officers knew that the suspect, Nabors, had a firearm. *Id.* Unlike in this case, this firearm was not legally owned. *Id.* In fact, ownership of it constituted a felony. *Id.* However, the officers still knocked and announced: "[t]he agents knocked on the apartment door and yelled, '"Police!,' and, 'Police search warrant!'" *Id.* In his escape Nabors shot an officer in the cheek. *Id.* His apartment contained a rifle, a pistol, cocaine, and drug paraphernalia. *Id.*

All the factors indicating officer peril present in the instant case were likewise present in *Nabors*, but to a far greater extent. The warrant indicated that "Nabors was suspected of trafficking in narcotics, was a felon in the possession of an array of firearms, and habitually wore a bullet-proof vest." *Id.* at 1354. However, in direct contrast to the Eleventh Circuit's current ruling, the Sixth Circuit still expressly said the officers must knock and announce before entering.

In contrast to the instant case, the Second Circuit in *United States v. Spinelli*, permitted a no-knock entry in similar circumstances but only where a wealth of specific detail suggested officer peril. 848 F. 2d 26 (2nd Cir. 1988). The Second Circuit pointed to a plethora of *additional* particularized evidence not present in the instant case, such as that Spinelli's street name was "Mad Man," that he had a reputation for violence, and that he was named on a United States Marshal's bulletin as wanted for parole

violation and considered armed and dangerous." *Id.* at 29. Finally, the officers knew that Spinelli was aware of their presence. *Id.* at 30. In the instant case, Anthony had no history of or reputation for violence, was specifically cited as non-violent by informants, and had no idea officers were present or planning to raid his home.

Like the Sixth Circuit and Second Circuit, the Eighth Circuit has also stated that the reasonable belief that firearms might be within the residence, standing alone, is clearly insufficient to justify entering a residence without the police knocking and announcing first. *United States v. Marts*, 986 F.2d 1216, 1217-18 (8th Cir.1993).

In a case in apparent conflict with the Eleventh Circuit's decision in this case, in *United States v. Lucht*, 18 F.3d 541 (8th Cir. 1994) cert. denied, 115 S.Ct. 363 (1994), the Eighth Circuit ruled a no-knock entry impermissible where police knew weapons were present in home, but where they had no indication that the suspect was violent or would use the weapons. This case involved an investigation of Hell's Angels members suspected of drug dealing. The court in *Lucht* emphasized that "[e]xigent circumstances will excuse noncompliance with the knock and announce requirement when the officers, "after considering the *particular* facts regarding the premises to be searched and the circumstances surrounding the execution of the warrant," reasonably decide there is an urgent need to force entry." *Id.* at 549.

In *Lucht*, the Eight Circuit found a knock and announce necessary even in circumstances where officers had "reason to believe weapons were present." *Id.* at 550. In addition, the suspect possessed drugs and had completed a drug transaction; weapons had been found in his home twice previously, he had a prior conviction for being a felon in possession of a firearm, and a prior arrest for assault with a firearm. The suspect also had a motion detector outside his home and officers were in an exposed position. *Id.*

Despite the showing of officer peril (far higher than that in the instant case,) the Eighth Circuit nonetheless found the officers' knock and announce necessary based on the lack of evidence that the suspect had a violent history or record. The officer was "not aware of any charges against Kress [the suspect] for assaulting a police officer or of any incidents in Omaha where any member of the Hell's Angels Motorcycle Club attacked an officer." *Id.* The Eighth Circuit in requiring a knock and announce, stated that "a decision to force entry cannot rest on an assumption. It requires consideration of the particular facts and circumstances surrounding the execution of the warrant." *Id.* The court further stated that the officers "did not hear or see anything to indicate they were in danger." *Id.* Despite the "likelihood that there were weapons in the house," the officers "had no information indicating that [the suspect] was considered dangerous or violent or might be inclined to use the weapons against them. *See United States v. Marts,* 986 F.2d 1216, 1217-18 (8th Cir.1993) (reasonable belief firearms may have been within residence, standing alone, clearly

insufficient for exigent circumstances)." *Id.* Furthermore, any "propensity for anti-police sentiments was not based on any particularized knowledge. In fact, Kress's criminal record consisted of a nine-year-old misdemeanor drug possession conviction and a thirteen-year-old charge for carrying a concealed weapon for which prosecution was declined." *Id.*

There is thus no doubt that this case would have come out differently if it had been litigated in the Eighth Circuit rather than the Eleventh Circuit.

The Seventh Circuit also reaches very different results from the Eleventh Circuit when confronted with facts similar to those of the instant case. In *Molina ex. rel. Molina v. Cooper*, 325 F.3d 963 (7th Cir. 2003), the target of the warrant had a criminal history, alleged drug distribution activities, association with gangs, and stash of weapons at his home qualifying the search as "high-risk." *Id.* at 966. Still, the Seventh Circuit required knocking and announcing before the police entered the residence. *Id.*

As in this case, two informants had related to police that the suspect had a history of dealing drugs and kept weapons in the home. Unlike in this case, the suspect in *Molina* had more indicators of potential dangerousness, including active gang affiliations and a wide assortment of illegal weapons including brass knuckles, a switchblade, fireworks, and three homemade bombs with functional fuses, in contrast to Diotaiuto's legally owned firearms. *Id.* at

967. However the Seventh Circuit held that the officers acted correctly in performing a knock and announce, specifically detailing in the opinion that "Trooper Bain, a TRT member, initiated the search by knocking on the front door and calling out three times, "Illinois State Police search warrant, open the door!" *Id.* The Seventh Circuit also required a knock and announce in *United States v. Jones*, 208 F.3d 603, 610 (7th Cir. 2000), where the officers "had information that the defendant was a dangerous felon in possession of a gun."

In *Jones v. Wilhelm*, 425 F.3d 455 (7th Cir. 2005), the Seventh Circuit again came to a holding different from that of the Eleventh Circuit. Officers executed a search warrant on the home of a suspected drug dealer. *Id.* at 455. As in the instant case, the executing officer argued that the knock and announce violation should be "excused on the basis of exigent circumstances inherent in executing a search warrant at night on a suspected drug operation." *Id.* at 468. The Seventh Circuit specifically rejected this argument because "nothing in the warrant suggested or predicted a particular risk of violence or destruction of evidence." *Id.* This is in direct conflict with the Eleventh Circuit's ruling in this case.

In *Hernandez v. Conde*, 272 Fed. Appx. 663 (10th Cir. 2008) the Tenth Circuit likewise held a knock and announce necessary given facts similar to the instant case. Police officers attempted a drug bust, knowing that the execution would likely be dangerous. *Id.* at 666. As in the instant case, a team member threw a flash-bang device before the officers

entered the dwelling. *Id.* However in this case, the Tenth Circuit held a knock and announce to be necessary before the officers entered the dwelling. *Id.*

The issue constantly arises as to whether police may enter a dwelling without knocking and announcing based on a belief that weapons are present, or whether there must be a more particularized based for believing that there would be danger to the officers. There is a clear split among the circuits on this issue and thus a need for this Court to grant review to settle this disagreement.

C. Resolution Of This Issue Is Of Crucial Importance To Civil Rights Plaintiffs, Police Officers, and Third Parties

The knock and announce requirement protects both individuals and law enforcement in several important ways. Knocking and announcing prevents unnecessary property damage and allows home dwellers a few moments to gather themselves and put on clothing before officers enter.

Furthermore, the requirement prevents unnecessary violence and resistance by confused inhabitants during the crucial and dangerous moment when officers breach a person's home. A knock and announce by the police ensures the inhabitants will not mistake police for home intruders and resist. This rule likewise protects innocent inhabitants of a home who might get caught in the crossfire.

The tension between the Eleventh Circuit's decision and the rulings of this Court and other circuits leaves officers uninformed as to the proper and lawful response to heightened circumstances which fall short of true exigency. This guidance is crucial to their safe and successful operations in law enforcement, and to shield them from undeserved legal consequences.

The Eleventh Circuit's opinion exonerating the officers who shot and killed Anthony Diotaiuto, disregards the crucial nature of the knock and announce requirement. Its ruling is overbroad, encompassing far too many people who may legally own a weapon, but do not pose a danger to police. In fact, this was just the case with Anthony Diotaiuto, who, far from being a dangerous criminal, was a young student and a new homeowner with no history of violence whatsoever. Furthermore, this ruling dangerously opens the door to more per se exceptions to the knock and announce requirement.

As stated by Justice Kennedy in his concurrence to *Michigan v. Hudson*, "[i]t bears repeating that this is a serious matter if law enforcement officers violate the sanctity of the home by ignoring the requisites of lawful entry. Security must not be subject to erosion by indifference or contempt." *Hudson* at 602.

This Court should grant review to resolve a tension with its prior rulings and a conflict among the circuits as to whether the law is clearly established that the lawful presence of drugs and weapons are not sufficient to allow police to depart from the

constitutional requirement of knocking and announcing before entering a dwelling.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: March 8, 2010.

Respectfully submitted,

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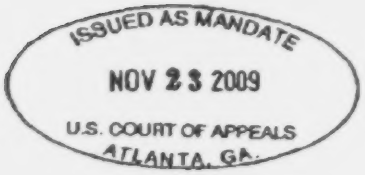
APPENDIX A

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 08-12900

D.C. Docket No. 07-60476 CV-WPD



FILED
U.S. Court of Appeals
Eleventh Circuit
Aug. 31, 2009
Thomas K. Kahn, Clerk

MARLENE WHITTIER,
as Personal Representative of the Estate
of Anthony Diotaiuto deceased and individually,
ANDREW DIOTAIUTO,
Plaintiffs-Appellees,

versus

ANDRE BRUNA, individually,
SEAN VISNERS, individually,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered:	August 31, 2009
For the Court:	Thomas K. Kahn, Clerk
By:	Gilman, Nancy

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-12900

D.C. Docket No. 07-60476 CV-WPD

FILED
U.S. Court of Appeals
Eleventh Circuit
Aug. 31, 2009
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MARLENE WHITTIER,
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of Anthony Diotaiuto deceased and individually,
ANDREW DIOTAIUTO,
Plaintiffs-Appellees,

versus

ANDRE BRUNA, individually,
SEAN VISNERS, individually,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(August 31, 2009)

Before EDMONDSON, BLACK and SILER,* Circuit Judges.

PER CURIAM:

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* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

Andre Bruna and Sean Visners, two officers with the City of Sunrise, Florida, Police Department, appeal the district court's order denying in part their motion for summary judgment. Bruna and Visners were members of a Special Weapons and Tactics (SWAT) team that conducted a raid on Plaintiff-Appellee Marlene Whittier's home, which she shared with her son, Anthony Diotaiuto. During the raid, Diotaiuto was shot and killed. Whittier brought a 42 U.S.C. § 1983 action, both individually and as personal representative of Diotaiuto's estate, against several members of the SWAT team alleging, *inter alia*, Bruna and Visners violated her son's Fourth Amendment rights when they entered her home without first knocking and announcing their presence. After extensive discovery, Bruna and Visners moved for summary judgment, arguing they were entitled to qualified immunity and no genuine issue of material fact existed as to whether a knock and announce occurred. The district court denied their motion as to Whittier's knock-and-announce claim. Because Bruna and Visners are entitled to qualified immunity, we now reverse.

I. FACTS

In July 2005, one of Anthony Diotaiuto's neighbors informed the City of Sunrise Police Department (Sunrise police) that Diotaiuto was selling large quantities of cannabis and cocaine from his residence. Based upon this information, law enforcement began an investigation of Diatiuto's drug activity, which included surveillance of the Whittier/Diotaiuto residence and a "controlled buy" of marijuana by a confidential informant. In addition to evidence that Diotiuto was selling illegal narcotics in his home, the investigation also revealed Diataiuto carried a handgun on his person at all times and kept a loaded shotgun in his bedroom closet.

On August 3, 2005, a state circuit judge signed a warrant for the Sunrise police to search the Whittier/Diotaiuto home. Based upon Diotaiuto's drug activity and possession of firearms, the Sunrise police classified the warrant as "high risk," which the Sunrise police define as "involving acts of violence or potential acts of violence." The Sunrise police use a SWAT team in the service of all "high risk" warrants, and thus a SWAT team was assembled to serve the warrant on the Whittier/Diotaiuto residence.

In preparation for the service of the warrant, the Sunrise police made a SWAT operational plan. This plan indicated Diotaiuto sold illegal narcotics from his home, had a criminal history, and possessed two firearms–a semi-automatic handgun carried on his person and a shotgun kept in his bedroom closet. The plan also called for an eight-man SWAT team to execute the warrant; a team leader was responsible for knocking and announcing the presence of the SWAT team prior to entry, while appellants Bruna and Visners were positioned "in the stack." The members of the SWAT team received and reviewed the information in the operational plan during a briefing that was held in the early morning hours of August 5, 2005.[1]

Following the briefing, at just after 6:00 a.m. on that same day, the SWAT team arrived at the Whittier/Diotaiuto residence to execute the warrant. According to the testimony of the officers, the SWAT team leader approached the door, knocked loudly several times, and announced the presence of the Sunrise police and the search warrant. Fourteen police officers present at the scene testified they heard a knock and

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[1] Visners did not attend this briefing; he instead was privately briefed by the SWAT team leader at approximately 5:40 the same morning.

announce. Only a single officer did not hear a knock and announce. Despite the fact that nearly every officer present heard a loud and forceful knock and announce, not a single neighbor heard a knock or an announcement of the police presence. At least three neighbors testified they were listening and would have been able to hear such an announcement if it had occurred.

Next, the SWAT team leader signaled for the breach team to open the front door. After the door was pried open, the SWAT team entered the home and encountered Diotaiuto, who was instructed to "get on the ground." Diotaiuto did not comply with the order and instead ran to his bedroom. Bruna and Visners followed in pursuant, kicked open the bedroom door, and followed Diotaiuto inside. According to the testimony of the officers, Diotaiuto entered his closet, racked a gun, and pointed it at the officers. Both Bruna and Visners were yelling at Diotaiuto to put the gun down. They then opened fire and Diotaiuto fell back into the closet. From a seated position in the closet, Diotaiuto began to raise his gun again. Both officers yelled at Diotaiuto to drop the gun; their commands, however, were disregarded. Bruna and Visners fired again, and Diotaiuto was killed.

II. STANDARD OF REVIEW

This Court reviews "*de novo* a district court's disposition of a summary judgment motion based on qualified immunity, applying the same legal standards as the district court." *Durruthy v. Pastor,* 351 F.3d 1080, 1084 (11th Cir. 2003). We resolve all issues of material fact in favor of the plaintiff, and then, under that version of the facts, determine the legal question of whether the defendant is entitled to qualified immunity. *Id.*

III. DISCUSSION

"Qualified immunity protects government officials performing discretionary functions from suits in their individual capacities unless their conduct violates 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Dalrymple v. Reno*, 334 F.3d 991, 994 (11th Cir. 2003) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 2515 (2002)). "[T]o receive qualified immunity, an official must first establish that 'he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred.'" *McCullough v. Antolini*, 559 F.3d 1201, 1205 (11th Cir. 2009) (quoting *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002)).

"If the official was acting within the scope of his discretionary authority . . . the burden shifts to the plaintiff to show that the official is not entitled to qualified immunity." *Skop v. City of Atlanta*, 485 F.3d 1130, 1136-37 (11th Cir. 2007). "To overcome qualified immunity, the plaintiff must satisfy a two prong test; he must show that: (1) the defendant violated a constitutional right, and (2) this right was clearly established at the time of the alleged violation." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1264 (11th Cir. 2004). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202, 121 S. Ct. 2152, 2156 (2001).

Whittier asserts Bruna and Visners entered her and her son's residence without first knocking and announcing their presence in violation of the Fourth Amendment. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable

searches and seizures." U.S. Const. Amend. IV. In *Wilson v. Arkansas*, 514 U.S. 927, 929, 115 S. Ct. 1914, 1915 (1995), the Supreme Court held the Fourth Amendment reasonableness inquiry incorporated the common law requirement that officers, when executing a search warrant, must knock on a door and announce their identity before attempting a forcible entry into a home. The Court, however, recognized "[t]he Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests," *id.* at 934, 115 S. Ct. at 1918, and noted the knock-and-announce requirement could give way "under circumstances presenting a threat of physical violence," or "where police officers have reason to believe that evidence would likely be destroyed if advance notice were given," *id.* At 936, 115 S. Ct. at 1919.

Following *Wilson*, some courts created a blanket exception to the knock-and-announce requirement in felony drug cases, based in part on the generalization that these cases often involve a threat of violence and destruction of drugs. *See Richards v. Wisconsin*, 520 U.S. 385, 392, 117 S. Ct. 1416, 1420 (1997). In *Richards v. Wisconsin*, however, the Supreme Court rejected such a categorical exception and instead adopted a case-by-case approach for determining if law enforcement acted reasonably in entering a residence without first knocking and announcing: "In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Id.* at 394, 117 S. Ct. at 1421. The Court acknowledged, however, "[t]his showing is not high." *Id.*, 117 S. Ct. at 1422.

Both *Wilson* and *Richards* were criminal cases in which the defendants had moved to suppress evidence based upon alleged Fourth Amendment violations. In the context of qualified immunity, this Court has stated "the issue is not whether reasonable suspicion existed in fact, but whether the officer had 'arguable' reasonable suspicion." *Jackson v. Sauls*, 206 F.3d 1156, 1166 (11th Cir. 2000). In other words, we analyze whether a reasonable officer could have had reasonable suspicion that exigent circumstances, such as a threat of violence and/or destruction of evidence, existed to justify the no-knock entry. *See Brent v. Ashley*, 247 F.3d 1294, 1303 (11th Cir. 2001) (discussing the arguable reasonable suspicion standard within the context of strip searches). In undertaking the arguable reasonable suspicion inquiry, this Court must examine the totality of the circumstances to determine whether an officer had a "particularized and objective" basis to support his suspicion. *Id.* at 1304. Whether the officer's suspicion ends up being mistaken is immaterial so long as it was reasonable. *Id.* at 1303.

Within the context of warrantless searches, we have held the mere presence of contraband, without more, does not give rise to exigent circumstances. *United States v. Tobin*, 923 F.2d 1506, 1510 (11th Cir. 1991). At the same time, however, we have also repeatedly noted the dangerous, and often violent, combination of drugs and firearms, *see, e.g., United States v. Hromada*, 49 F.3d 685, 689 (11th Cir. 1995) ("Guns and violence go hand-in-hand with illegal drug operations."), and several of our sister circuits have concluded this combination may give rise to reasonable suspicion of danger and justify a no-knock entry, *see United States v. Stevens*, 439 F.3d 983, 988-89 (8th Cir. 2006) (affirming a magistrate judge's conclusion that a no-knock search was justified based upon the presence of drugs and a sawed-off

shotgun in a common area of the house); *United States v. Washington*, 340 F.3d 222, 227 (5th Cir. 2003) (stating information that "the suspect was selling drugs and was typically armed . . . . exceeds the level this circuit has found sufficient to establish a reasonable suspicion of danger").

In this case, we conclude Bruna and Visners are entitled to qualified immunity because a reasonable officer could have had reasonable suspicion that knocking and announcing his presence would have been dangerous under the circumstances facing the SWAT team.[2]

Those circumstances included serving a search warrant on the home of a suspected drug dealer (Diotaiuto), who had ready access to firearms and occupied the premises when the SWAT team arrived to serve the warrant. Indeed, based upon the information available to the SWAT team, Diotaiuto (1) received and sold narcotics, including cocaine and marijuana, at his residence; (2) had a criminal history; (3) carried a concealed semi-automatic handgun on his person; and (4) possessed a shotgun that he kept in his bedroom. This information, which was contained in the SWAT team's operational plan and received and reviewed by the members of the team, provided a "particularized and objective" basis for a reasonable officer to suspect the situation had a potential for violence and to believe exigent circumstances existed to

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[2] We are aware that the officers maintain a knock and announcement took place and that fourteen officers have testified to that effect. Whether a knock and announce actually occurred, however, is irrelevant to our analysis of arguable reasonable suspicion, and thus the outcome in this case is the same under both the officers' and Whittier's versions of the facts.

justify a no-knock entry.[3]

The fact that the operational plan called for a knock and announce prior to entry does not alter our analysis. Even assuming the operational plan, which was prepared prior to the service of the warrant, speaks for what Bruna and Visners actually believed as they stood "in the stack" outside the Whittier/Diotaiuto residence, the officers' *subjective* beliefs regarding the circumstances are irrelevant to the qualified immunity inquiry. *See Harlow v. Fitzgerald*, 457 U.S. 800, 817-18, 102 S. Ct. 2727, 2737-38 (1982) (discarding the subjective component of the qualified immunity inquiry and adopting the "objective reasonableness" standard); *Jackson*, 206 F.3d at 1165 ("[T]he standard for determining if an officer violated clearly established law is an objective one and does not include inquiry into the officer's subjective intent or beliefs."). Moreover, we have held an officer is entitled to qualified immunity even when he reasonably, but mistakenly, believes reasonable suspicion is present, *see Brent*, 247 F.3d

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[3] Our inquiry is whether Bruna and Visners had arguable reasonable suspicion that exigent circumstances existed to justify a no-knock entry, and thus we specifically decline to address whether exigent circumstances did indeed exist under the facts of this case. In a footnote of its order denying the SWAT team leader's motion for summary judgment as to the knock-and-announce claim, the district court concluded no exigent circumstances existed. On appeal, we do not disturb this determination because the pertinent inquiry is not whether exigent circumstances *actually* existed, but whether a reasonable officer, acting under the same circumstances and possessing the same knowledge as Bruna and Visners, *could have believed* they did. *See* Jackson, 206 F.3d at 1165-66.

at 1303; it makes little sense to not afford the same protection to an officer who, sensitive to the rights citizens enjoy under the Constitution, initially, but mistakenly, believes the situation involves a constitutional protection, but later learns it does not.

IV. CONCLUSION

In sum, we conclude Bruna and Visners are entitled to qualified immunity on Whittier's knock-and-announce claim. Accordingly, we reverse the district court's order denying their motion for summary judgment as to this claim.[4]

REVERSED.

A True Copy - Attested
Clerk U.S. Court of Appeals,
Eleventh Circuit

By: /s/ _____
Deputy Clerk
Atlanta, Georgia

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[4] Because we conclude Bruna and Visners are entitled to summary judgment on the basis of qualified immunity, we need not address the second issue they raise on appeal–that is, whether they are entitled to summary judgment on the ground that no genuine issue of material fact existed as to whether a knock and announce actually occurred. We note, however, we likely would not have jurisdiction to consider this issue on an interlocutory appeal, as it is not a part of, or inextricably intertwined with, the core qualified immunity issue. *See Behrens v. Pelletier*, 516 U.S. 299, 312-13, 116 S. Ct. 834, 842 (1996); *Koch v. Rugg*, 221 F.3d 1283, 1295-96 (11th Cir. 2000).

APPENDIX B

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-12836

D.C. Docket No. 07-60476 CV-WPD

FILED
U.S. Court of Appeals
Eleventh Circuit
Aug. 31, 2009
Thomas K. Kahn, Clerk

MARLENE WHITTIER,
as Personal Representative of the Estate
of Anthony Diotaiuto deceased and individually,
ANDREW DIOTAIUTO,
Plaintiffs-Appellees,

versus

ERIC GOLDSTEIN, individually,
ERIK PALACIO, individually,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(August 31, 2009)

Before EDMONDSON, BLACK and SILER,* Circuit Judges.

PER CURIAM:

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* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

Eric Goldstein and Erik Palacio, two officers with the City of Sunrise, Florida, Police Department, appeal the district court's order denying in part their motion for summary judgment. Goldstein and Palacio were members of a Special Weapons and Tactics (SWAT) team that conducted a raid on Plaintiff-Appellee Marlene Whittier's home, which she shared with her son, Anthony Diotaiuto. During the raid, Diotaiuto was shot and killed. Whittier brought a 42 U.S.C. § 1983 action, both individually and as personal representative of Diotaiuto's estate, against several members of the SWAT team alleging, *inter alia*, Goldstein and Palacio violated her son's Fourth Amendment rights when they forcibly opened and entered her home without first knocking and announcing their presence. After extensive discovery, Goldstein and Palacio moved for summary judgment, arguing they were entitled to qualified immunity and no genuine issue of material fact existed as to whether a knock and announce occurred. The district court denied their motion. Because Goldstein and Palacio are entitled to qualified immunity, we now reverse.

I. FACTS

In July 2005, one of Anthony Diotaiuto's neighbors informed the City of Sunrise Police Department (Sunrise police) that Diotaiuto was selling large quantities of cannabis and cocaine from his residence. Based upon this information, law enforcement began an investigation of Diatiuto's drug activity, which included surveillance of the Whittier/Diotaiuto residence and a "controlled buy" of marijuana by a confidential informant. In addition to evidence that Diotiuto was selling illegal narcotic in his home, the investigation also revealed Diataiuto carried a handgun on his person at all times and kept a loaded shotgun in his bedroom closet.

On August 3, 2005, a state circuit judge signed a warrant for the Sunrise police to search the Whittier/Diotaiuto home. Based upon Diotiuto's drug activity and possession of firearms, the Sunrise police classified the warrant as "high risk," which the Sunrise police define as "involving acts of violence or potential acts of violence." The Sunrise police use a SWAT team in th service of all "high risk" warrants, and thus a SWAT team was assembled to serve the warrant on the Whittier/Diotaiuto residence.

In preparation for the service of the warrant, the Sunrise police made a SWAT operational plan. This plan indicated Diotaiuto sold illegal narcotics from his home, had a criminal history, and possessed two firearms--a semi-automatic handgun carried on his person and a shotgun kept in his bedroom closet. The plan also called for an eight-man SWAT team to execute the warrant; a team leader was responsible for knocking and announcing the presence of the SWAT team prior to entry, while appellants Goldstein and Palacio were positioned "in the stack" and assigned to the breach team. The members of the SWAT team received and reviewed the information in the operational plan during a briefing that was held in the early morning hours of August 5, 2005.

Following the briefing, at just after 6:00 a.m. on that same day, the SWAT team arrived at the Whittier/Diotaiuto residence to execute the warrant. According to the testimony of the officers, the SWAT team leader approached the door, knocked loudly several times, and announced the presence of the Sunrise police and the search warrant. Fourteen police officers present at the scene testified they heard a knock and announce. Only a single officer did not hear a knock and announce. Despite the fact that nearly every officer present heard a loud and forceful knock and announce, not a single neighbor heard a knock or an announcement of the police

presence. At least three neighbors testified they were listening and would have been able to hear such an announcement if it had occurred.

Next, the SWAT team leader signaled for Goldstein and Palacio to breach the front door. Goldstein and Palacio followed the order and pried the door open, enabling the SWAT team to enter the home. After encountering Diotaiuto, the SWAT team leader instructed Diotaiuto to "get on the ground." Diotaiuto did not comply with the order and instead ran to his bedroom. Two SWAT team officers followed in pursuant, kicked open the bedroom door, and followed Diotaiuto inside. According to the testimony of the officers, Diotaiuto entered his closet, racked a gun, and pointed it at the officers. Both officers were yelling at Diotaiuto to put the gun down. They then opened fire, and Diotaiuto fell back into the closet. From a seated position in the closet, Diotaiuto began to raise his gun again. Both officers yelled at Diotaiuto to drop the gun; their commands, however, were disregarded. The officers fired again, and Diotaiuto was killed.

II. STANDARD OF REVIEW

This Court reviews "*de novo* a district court's disposition of a summary judgment motion based on qualified immunity, applying the same legal standards as the district court." *Durruthy v. Pastor,* 351 F.3d 1080, 1084 (11th Cir. 2003). We resolve all issues of material fact in favor of the plaintiff, and then, under that version of the facts, determine the legal question of whether the defendant is entitled to qualified immunity. *Id.*

III. DISCUSSION

"Qualified immunity protects government officials performing discretionary functions from suits in their individual capacities unless their conduct violates 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Dalrymple v. Reno*, 334 F.3d 991, 994 (11th Cir. 2003) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 2515 (2002)). "[T]o receive qualified immunity, an official must first establish that 'he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred.'" *McCullough v. Antolini*, 559 F.3d 1201, 1205 (11th Cir. 2009) (quoting *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002)).

"If the official was acting within the scope of his discretionary authority . . . the burden shifts to the plaintiff to show that the official is not entitled to qualified immunity." *Skop v. City of Atlanta*, 485 F.3d 1130, 1136-37 (11th Cir. 2007). "To overcome qualified immunity, the plaintiff must satisfy a two prong test; he must show that: (1) the defendant violated a constitutional right, and (2) this right was clearly established at the time of the alleged violation." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1264 (11th Cir. 2004). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202, 121 S. Ct. 2152, 2156 (2001).

Whittier asserts Goldstein and Palacio entered her and her son's residence without first knocking and announcing their presence in violation of the Fourth Amendment. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable

searches and seizures." U.S. Const. Amend. IV. In *Wilson v. Arkansas*, 514 U.S. 927, 929, 115 S. Ct. 1914, 1915 (1995), the Supreme Court held the Fourth Amendment reasonableness inquiry incorporated the common law requirement that officers, when executing a search warrant, must knock on a door and announce their identity before attempting a forcible entry into a home. The Court, however, recognized "[t]he Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests," *id.* at 934, 115 S. Ct. at 1918, and noted the knock-and-announce requirement could give way "under circumstances presenting a threat of physical violence," or "where police officers have reason to believe that evidence would likely be destroyed if advance notice were given," *id.* At 936, 115 S. Ct. At 1919.

Following *Wilson*, some courts created a blanket exception to the knock-and-announce requirement in felony drug cases, based in part on the generalization that these cases often involve a threat of violence and destruction of drugs. *See Richards v. Wisconsin*, 520 U.S. 385, 392, 117 S. Ct. 1416, 1420 (1997). In *Richards v. Wisconsin*, however, the Supreme Court rejected such a categorical exception and instead adopted a case-by-case approach for determining if law enforcement acted reasonably in entering a residence without first knocking and announcing: "In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Id.* at 394, 117 S. Ct. at 1421. The Court acknowledged, however, "[t]his showing is not high." *Id.*, 117 S. Ct. at 1422.

Both *Wilson* and *Richards* were criminal cases in which the defendants had moved to suppress evidence based upon alleged Fourth Amendment violations. In the context of qualified immunity, this Court has stated "the issue is not whether reasonable suspicion existed in fact, but whether the officer had 'arguable' reasonable suspicion." *Jackson v. Sauls*, 206 F.3d 1156, 1166 (11th Cir. 2000). In other words, we analyze whether a reasonable officer could have had reasonable suspicion that exigent circumstances, such as a threat of violence and/or destruction of evidence, existed to justify the no-knock entry. *See Brent v. Ashley*, 247 F.3d 1294, 1303 (11th Cir. 2001) (discussing the arguable reasonable suspicion standard within the context of strip searches). In undertaking the arguable reasonable suspicion inquiry, this Court must examine the totality of the circumstances to determine whether an officer had a "particularized and objective" basis to support his suspicion. *Id.* at 1304. Whether the officer's suspicion ends up being mistaken is immaterial so long as it was reasonable. *Id.* at 1303.

Within the context of warrantless searches, we have held the mere presence of contraband, without more, does not give rise to exigent circumstances. *United States v. Tobin*, 923 F.2d 1506, 1510 (11th Cir. 1991). At the same time, however, we have also repeatedly noted the dangerous, and often violent, combination of drugs and firearms, *see, e.g., United States v. Hromada,* 49 F.3d 685, 689 (11th Cir. 1995) ("Guns and violence go hand-in-hand with illegal drug operations."), and several of our sister circuits have concluded this combination may give rise to reasonable suspicion of danger and justify a no-knock entry, *see United States v. Stevens,* 439 F.3d 983, 988-89 (8th Cir. 2006) (affirming a magistrate judge's conclusion that a no-knock search was justified based upon the presence of drugs and a sawed-off

shotgun in a common area of the house); *United States v. Washington*, 340 F.3d 222, 227 (5th Cir. 2003) (stating information that "the suspect was selling drugs and was typically armed . . . . exceeds the level this circuit has found sufficient to establish a reasonable suspicion of danger").

In this case, we conclude Goldstein and Palacio are entitled to qualified immunity because a reasonable officer could have had reasonable suspicion that knocking and announcing his presence would have been dangerous under the circumstances facing the SWAT team.[1] Those circumstances included serving a search warrant on the home of a suspected drug dealer (Diotaiuto), who had ready access to firearms and occupied the premises when the SWAT team arrived to serve the warrant. Indeed, based upon the information available to the SWAT team, Diotaiuto (1) received and sold narcotics, including cocaine and marijuana, at his residence; (2) had a criminal history; (3) carried a concealed semi-automatic handgun on his person; and (4) possessed a shotgun that he kept in his bedroom. This information, which was contained in the SWAT team's operational plan and received and reviewed by the members of the team, provided a "particularized and objective" basis for a reasonable officer to suspect the situation had a potential for violence and to believe exigent circumstances existed to

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[1] We are aware that the officers maintain a knock and announcement took place and that fourteen officers have testified to that effect. Whether a knock and announce actually occurred, however, is irrelevant to our analysis of arguable reasonable suspicion, and thus the outcome in this case is the same under both the officers' and Whittier's versions of the facts.

justify a no-knock entry.[2]

The fact that the operational plan called for a knock and announce prior to entry does not alter our analysis. Even assuming the operational plan, which was prepared prior to the service of the warrant, speaks for what Goldstein and Palacio actually believed as they stood "in the stack" outside the Whittier/Diotaiuto residence, the officers' *subjective* beliefs regarding the circumstances are irrelevant to the qualified immunity inquiry. *See Harlow v. Fitzgerald*, 457 U.S. 800, 817-18, 102 S. Ct. 2727, 2737-38 (1982) (discarding the subjective component of the qualified immunity inquiry and adopting the "objective reasonableness" standard); *Jackson*, 206 F.3d at 1165 ("[T]he standard for determining if an officer violated clearly established law is an objective one and does not include inquiry into the officer's subjective intent or beliefs."). Moreover, we have held an officer is entitled to qualified immunity even when he reasonably, but mistakenly, believes reasonable suspicion is

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[2] Our inquiry is whether Goldstein and Palacio had arguable reasonable suspicion that exigent circumstances existed to justify a no-knock entry, and thus we specifically decline to address whether exigent circumstances did indeed exist under the facts of this case. In a footnote of its order denying the SWAT team leader's motion for summary judgment as to the knock-and-announce claim, the district court concluded no exigent circumstances existed. On appeal, we do not disturb this determination because the pertinent inquiry is not whether exigent circumstances *actually* existed, but whether a reasonable officer, acting under the same circumstances and possessing the same knowledge as Goldstein and Palacio, *could have believed* they did. *See Jackson*, 206 F.3d at 1165-66.

present, *see Brent*, 247 F.3d at 1303; it makes little sense to not afford the same protection to an officer who, sensitive to the rights citizens enjoy under the Constitution, initially, but mistakenly, believes the situation involves a constitutional protection, but later learns it does not.

IV. CONCLUSION

In sum, we conclude Goldstein and Palacio are entitled to qualified immunity on Whittier's knock-and-announce claim. Accordingly, we reverse the district court's order denying their motion for summary judgment.[3]

REVERSED.

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[3] Because we conclude Goldstein and Palacio are entitled to summary judgment on the basis of qualified immunity, we need not address the second issue they raise on appeal–that is, whether they are entitled to summary judgment on the ground that no genuine issue of material fact existed as to whether a knock and announce actually occurred. We note, however, we likely would not have jurisdiction to consider this issue on an interlocutory appeal, as it is not a part of, or inextricably intertwined with, the core qualified immunity issue. *See Behrens v. Pelletier*, 516 U.S. 299, 312-12, 116 S. Ct. 834, 842 (1996); *Kock v. Rugg*, 221 F.3d 1283, 1295-96 (11th Cir. 2000).

APPENDIX C

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-12998

D.C. Docket No. 07-60476 CV-WPD

FILED
U.S. Court of Appeals
Eleventh Circuit
Aug. 31, 2009
Thomas K. Kahn, Clerk

MARLENE WHITTIER,
as Personal Representative of the Estate
of Anthony Diotaiuto deceased and
individually, ANDREW DIOTAIUTO,
Plaintiffs-Appellees,

versus

DANIEL KOBAYASHI, individually,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(August 31, 2009)

Before EDMONDSON, BLACK and SILER,* Circuit Judges.

PER CURIAM:

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* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

Daniel Kobayashi, an officer with the City of Sunrise, Florida, Police Department, appeals the district court's order denying in part his motion for summary judgment. Kobayashi was a member of a Special Weapons and Tactics (SWAT) team that conducted a raid on Plaintiff-Appellee Marlene Whittier's home, which she shared with her son, Anthony Diotaiuto. During the raid, Diotaiuto was shot and killed. Whittier brought a 42 U.S.C. § 1983 action, both individually and as personal representative of Diotaiuto's estate, against several members of the SWAT team alleging, *inter alia*, Kobayashi violated her son's Fourth Amendment rights when he entered her home without first knocking and announcing the SWAT team's presence. After extensive discovery, Kobayashi moved for summary judgment, arguing he was entitled to qualified immunity and no genuine issue of material fact existed as to whether a knock and announce occurred. The district court denied his motion as to Whittier's knock-and-announce claim. Because Kobayashi is entitled to qualified immunity, we now reverse.

I. FACTS

In July 2005, one of Anthony Diotaiuto's neighbors informed the City of Sunrise Police Department (Sunrise police) that Diotaiuto was selling large quantities of cannabis and cocaine from his residence. Based upon this information, law enforcement began an investigation of Diatiuto's drug activity, which included surveillance of the Whittier/Diotaiuto residence and a "controlled buy" of marijuana by a confidential informant. In addition to evidence that Diotiuto was selling illegal narcotics in his home, the investigation also revealed Diataiuto carried a handgun on his person at all times and kept a loaded shotgun in his bedroom closet.

On August 3, 2005, a state circuit judge signed a warrant for the Sunrise police to search the Whittier/Diotaiuto home. Based upon Diotiuto's drug activity and possession of firearms, the Sunrise police classified the warrant as "high risk," which the Sunrise police define as "involving acts of violence or potential acts of violence." The Sunrise police use a SWAT team in th service of all "high risk" warrants, and thus a SWAT team was assembled to serve the warrant on the Whittier/Diotaiuto residence.

In preparation for the service of the warrant, the Sunrise police made a SWAT operational plan. This plan indicated Diotaiuto sold illegal narcotics from his home, had a criminal history, and possessed two firearms – a semi-automatic handgun carried on his person and a shotgun kept in his bedroom closet. The plan also called for an eight-man SWAT team to execute the warrant; Kobayashi was designated as the team leader and was responsible for knocking and announcing the presence of the SWAT team prior to entry. The members of the SWAT team received and reviewed the information in the operational plan during a briefing that was held in the early morning hours of August 5, 2005.

Following the briefing, at just after 6:00 a.m. on that same day, the SWAT team arrived at the Whittier/Diotaiuto residence to execute the warrant. According to the testimony of the officers, Kobayashi approached the door, knocked loudly several times, and announced the presence of the Sunrise police and the search warrant. Fourteen police officers present at the scene testified they heard a knock and announce. Only a single officer did not hear a knock and announce. Despite the fact that nearly every officer present heard a loud and forceful knock and announce, not a single neighbor heard a knock or an announcement of the police presence. At least three neighbors testified they were

listening and would have been able to hear such an announcement if it had occurred.

Next, Kobayashi signaled for the breach team to open the front door. After the door was pried open, the SWAT team entered the home and encountered Diotaiuto, whom Kobayashi instructed to "get on the ground." Diotaiuto did not comply with the order and instead ran to his bedroom. Two SWAT team officers followed in pursuant, kicked open the bedroom door, and followed Diotaiuto inside. According to the testimony of the officers, Diotaiuto entered his closet, racked a gun, and pointed it at the officers. Both officers were yelling at Diotaiuto to put the gun down. They then opened fire, and Diotaiuto fell back into the closet. From a seated position in the closet, Diotaiuto began to raise his gun again. Both officers yelled at Diotaiuto to drop the gun; their commands, however, were disregarded. The officers fired again, and Diotaiuto was killed.

II. STANDARD OF REVIEW

This Court reviews " *de novo* a district court's disposition of a summary judgment motion based on qualified immunity, applying the same legal standards as the district court." *Durruthy v. Pastor,* 351 F.3d 1080, 1084 (11th Cir. 2003). We resolve all issues of material fact in favor of the plaintiff, and then, under that version of the facts, determine the legal question of whether the defendant is entitled to qualified immunity. *Id.*

III. DISCUSSION

"Qualified immunity protects government officials performing discretionary functions from suits in their individual capacities unless their conduct violates 'clearly

established statutory or constitutional rights of which a reasonable person would have known.'" *Dalrymple v. Reno*, 334 F.3d 991, 994 (11th Cir. 2003) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 2515 (2002)). "[T]o receive qualified immunity, an official must first establish that 'he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred.'" *McCullough v. Antolini*, 559 F.3d 1201, 1205 (11th Cir. 2009) (quoting *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002)).

"If the official was acting within the scope of his discretionary authority . . . the burden shifts to the plaintiff to show that the official is not entitled to qualified immunity." *Skop v. City of Atlanta*, 485 F.3d 1130, 1136-37 (11th Cir. 2007). "To overcome qualified immunity, the plaintiff must satisfy a two prong test; he must show that: (1) the defendant violated a constitutional right, and (2) this right was clearly established at the time of the alleged violation." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1264 (11th Cir. 2004). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it ould be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202, 121 S. Ct. 2152, 2156 (2001).

Whittier asserts Kobayashi entered her and her son's residence without first knocking and announcing their presence in violation of the Fourth Amendment. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. In *Wilson v. Arkansas*, 514 U.S. 927, 929, 115 S. Ct. 1914, 1915 (1995), the Supreme Court held the Fourth Amendment reasonableness inquiry incorporated the common law requirement that officers, when executing a search warrant,

must knock on a door and announce their identity before attempting a forcible entry into a home. The Court, however, recognized "[t]he Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests," *id.* at 934, 115 S. Ct. at 1918, and noted the knock-and-announce requirement could give way "under circumstances presenting a threat of physical violence," or "where police officers have reason to believe that evidence would likely be destroyed if advance notice were given," *id.* At 936, 115 S. Ct. at 1919.

Following *Wilson*, some courts created a blanket exception to the knock-and-announce requirement in felony drug cases, based in part on the generalization that these cases often involve a threat of violence and destruction of drugs. See *Richards v. Wisconsin*, 520 U.S. 385, 392, 117 S. Ct. 1416, 1420 (1997). In *Richards v. Wisconsin*, however, the Supreme Court rejected such a categorical exception and instead adopted a case-by-case approach for determining if law enforcement acted reasonably in entering a residence without first knocking and announcing: "In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Id.* at 394, 117 S. Ct. at 1421. The Court acknowledged, however, "[t]his showing is not high." *Id.*, 117 S. Ct. at 1422.

Both *Wilson* and *Richards* were criminal cases in which the defendants had moved to suppress evidence based upon alleged Fourth Amendment violations. In the context of qualified immunity, this Court has stated "the issue is not whether reasonable suspicion existed in fact, but whether the

officer had 'arguable' reasonable suspicion." *Jackson v. Sauls*, 206 F.3d 1156, 1166 (11th Cir. 2000). In other words, we analyze whether a reasonable officer could have had reasonable suspicion that exigent circumstances, such as a threat of violence and/or destruction of evidence, existed to justify the no-knock entry. *See Brent v. Ashley*, 247 F.3d 1294, 1303 (11th Cir. 2001) (discussing the arguable reasonable suspicion standard within the context of strip searches). In undertaking the arguable reasonable suspicion inquiry, this Court must examine the totality of the circumstances to determine whether an officer had a "particularized and objective" basis to support his suspicion. *Id.* at 1304. Whether the officer's suspicion ends up being mistaken is immaterial so long as it was reasonable. *Id.* at 1303.

Within the context of warrantless searches, we have held the mere presence of contraband, without more, does not give rise to exigent circumstances. *United States v. Tobin*, 923 F.2d 1506, 1510 (11th Cir. 1991). At the same time, however, we have also repeatedly noted the dangerous, and often violent, combination of drugs and firearms, *see, e.g., United States v. Hromada,* 49 F.3d 685, 689 (11th Cir. 1995) ("Guns and violence go hand-in-hand with illegal drug operations."), and several of our sister circuits have concluded this combination may give rise to reasonable suspicion of danger and justify a no-knock entry, *see United States v. Stevens,* 439 F.3d 983, 988-89 (8th Cir. 2006) (affirming a magistrate judge's conclusion that a no-knock search was justified based upon the presence of drugs and a sawed-off shotgun in a common area of the house); *United States v. Washington,* 340 F.3d 222, 227 (5th Cir. 2003) (stating information that "the suspect was selling drugs and was typically armed . . . . exceeds the level this circuit has found sufficient to establish a reasonable suspicion of danger").

In this case, we conclude Kobayshi is entitled to qualified immunity because a reasonable officer could have had reasonable suspicion that knocking and announcing his presence would have been dangerous under the circumstances facing the SWAT team.[1] Those circumstances included serving a search warrant on the home of a suspected drug dealer (Diotaiuto), who had ready access to firearms and occupied the premises when the SWAT team arrived to serve the warrant. Indeed, based upon the information available to the SWAT team, Diotaiuto (1) received and sold narcotics, including cocaine and marijuana, at his residence; (2) had a criminal history; (3) carried a concealed semi-automatic handgun on his person; and (4) possessed a shotgun that he kept in his bedroom. This information, which was contained in the SWAT team's operational plan and received and reviewed by the members of the team, provided a "particularized and objective" basis for a reasonable officer to suspect the situation had a potential for violence and to believe exigent circumstances existed to justify a no-knock entry.[2]

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[1] We are aware that Kobayashi maintains he did actually knock and announce the SWAT team's presence and that fourteen officers have testified to that effect. Whether a knock and announce actually occurred, however, is irrelevant to our analysis of arguable reasonable suspicion, and thus the outcome in this case is the same under both the officers' and Whittier's versions of the facts.

[2] Our inquiry is whether Kobayashi had arguable reasonable suspicion that exigent circumstances existed to justify a no-knock entry, and thus we specifically decline to address whether exigent circumstances did indeed exist under the facts of this case. In a footnote of

The fact that the operational plan called for a knock and announce prior to entry does not alter our analysis. Even assuming the operational plan, which was prepared prior to the service of the warrant, speaks for what Kobayashi actually believed as he stood outside the Whittier/Diotaiuto residence, Kobayashi's *subjective* beliefs regarding the circumstances are irrelevant to the qualified immunity inquiry. *See Harlow v. Fitzgerald*, 457 U.S. 800, 817-18, 102 S. Ct. 2727, 2737-38 (1982) (discarding the subjective component of the qualified immunity inquiry and adopting the "objective reasonableness" standard); *Jackson*, 206 F.3d at 1165 ("[T]he standard for determining if an officer violated clearly established law is an objective one and does not include inquiry into the officer's subjective intent or beliefs."). Moreover, we have held an officer is entitled to qualified immunity even when he reasonably, but mistakenly, believes reasonable suspicion is present, *see Brent*, 247 F.3d at 1303; it makes little sense to not afford the same protection to an officer who, sensitive to the rights citizens enjoy under the Constitution, initially, but mistakenly, believes the situation involves a constitutional protection, but later learns it does not.

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its order denying the SWAT team leader's motion for summary judgment as to the knock-and-announce claim, the district court concluded no exigent circumstances existed. On appeal, we do not disturb this determination because the pertinent inquiry is not whether exigent circumstances *actually* existed, but whether a reasonable officer, acting under the same circumstances and possessing the same knowledge as Kobayashi, *could have believed* they did. *See Jackson*, 206 F.3d at 1165-66.

IV. CONCLUSION

In sum, we conclude Kobayashi is entitled to qualified immunity on Whittier's knock-and-announce claim. Accordingly, we reverse the district court's order denying his motion for summary judgment as to this claim.[3]

REVERSED.

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[3] Because we conclude Kobayashi is entitled to summary judgment on the basis of qualified immunity, we need not address the second issue he raises on appeal–that is, whether he is entitled to summary judgment on the ground that no genuine issue of material fact existed as to whether a knock and announce actually occurred. We note, however, we likely would not have jurisdiction to consider this issue on an interlocutory appeal, as it is not a part of, or inextricably intertwined with, the core qualified immunity issue. *See Behrens v. Pelletier*, 516 U.S. 299, 312-12, 116 S. Ct. 834, 842 (1996); *Kock v. Rugg*, 221 F.3d 1283, 1295-96 (11th Cir. 2000).

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-60476-CIV-DIMITROULEAS
Magistrate Judge Rosenbaum

MARLENE WHITTIER, as Personal Representative for the Estate of ANTHONY DIOTAIUTO, deceased and individually,

Plaintiff,

vs.

CITY OF SUNRISE, a Municipality of the State of Florida, ANDRE BRUNA, individually, SEAN VISNERS, individually, DAVID BOYETT, individually, DANIEL KOBAYASHI, individually, ERIC GOLDSTEIN, individually, and ERIK PALACIO, individually,

Defendants.

ORDER GRANTING, IN PART, AND DENYING, IN PART, DEFENDANTS ANDRE BRUNA AND SEAN VISNERS' MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court upon Defendants Andre Bruna and Sean Visners' Motion for Summary Judgment [DE 143]. The Court has carefully considered the Motion, Plaintiff's Memorandum in Opposition [DE *155],* Defendants' Reply [DE 176], Defendants Daniel Kobayashi and the City of Sunrise's statement of Material Facts [DE 135], Plaintiffs Omnibus Statement of Material and Controverted Facts [DE 153] the parties attached exhibits and depositions and is otherwise fully advised in the premises.

I. BACKGROUND

On April 11, 2007 the Plaintiff, Marlene Whittier ("Plaintiff"), as Personal representative of her son Anthony Diotaiuto ("Diotaiuto"), and individually, filed a seven count Amended Complaint against Defendant Officers Eric Goldstein ("Goldstein"), Erik Palacio ("Palacio"), the City of Sunrise ("City"), Officer Sean Visners ("Visners"), Chief David Boyett,[1] Officer Andre Bruna ("Bruna") and Sergeant Daniel Kobayashi ("Kobayashi") [DE 9]. Plaintiffs son was shot to death by a police SWAT unit executing a search warrant in the early morning hours of August 5, 2005.

Early in the morning on August 5, 2005, the SWAT team was briefed, and received an operational plan, before executing a search warrant. The target of the search warrant was the Whittier/Diotaiuto home, located at 8500 N.W. 24th Court, Sunrise, Florida. The operational plan utilized an eight (8) man SWAT team to execute the warrant, called for the team leader to knock and announce prior to entry and called for the deployment of a flash-bang distraction device[2] before entry. Kobayashi was the SWAT supervisor and team leader. The SWAT team was dressed in full SWAT gear with the word "police" prominently displayed on their uniforms. All

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[1] On August 20, 2007 the Court granted Defendant David Boyett's Motion to Dismiss [DE *54*].

[2] A flash-bang distractionary device is a "light/sound diversionary device designed to emit a brilliant light and loud noise upon detonation. Its purpose is to stun, disorient, and temporarily blind its targets, creating a window of time in which police officers can safely enter and secure a potentially dangerous area." Boyd v. Benton County, 374 F.3d 773, 776 (9th Cir. 2004).

members of the SWAT team had attended extensive training and had been instructed that flash-bang devices should not be thrown directly at individuals. Palacio and Goldstein made up the breach team and were responsible for forcibly opening the residence door if necessary. Officer Bruna was responsible for deploying the flash-bang device.

According to police intelligence, Diotaiuto was a known drug dealer. Investigations into Diotaiuto's drug activity lead to the eventual issuance of a search warrant. Intelligence also revealed that Diotaiuto had a concealed weapons permit and carried a handgun on him at all times. Additional intelligence advised that he kept a shot-gun in the master bedroom closet of his home. Based on this information, the warrant service was labeled "high risk" which the City defines as "involving acts of violence or potential acts of violence." The City utilizes a SWAT team in the service of all "high risk" warrants.

Just after 6:00 in the morning on August 5, 2005 the SWAT team approached the door of the Whittier/Diotaiuto household. According to the testimony of the officers, Kobayashi approached the door, knocked loudly several times and announced the presence of the Sunrise Police and the search warrant.[3] Fourteen (14) police officers present at the scene testified that they heard Kobayashi knock and

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[3] Although all officers now testify that Sergeant Kobayashi was the one who knocked and announced, on August 5, 2005 Kobayashi gave a sworn statement indicating that it was Defendants Goldstein and Palacio who executed the knock and announce.

announce.[4] Only a single officer, Officer Bettencourt, did not hear the knock and announce. Despite the fact that nearly every officer present heard a loud and forceful, knock and announce, not a single neighbor heard a knock or an announcement of the police presence.[5] At least three neighbors, Noreen Dows,[6]

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[4] Defendant Officer Erik Palacio, Defendant Officer Eric Goldstein, Defendant Officer Sean Visners, Defendant Officer Andre Burna, Defendant Sergeant Daniel Kobayashi, Officer Kevin McDonnell, Lieutenant Charles Vitale, Officer John Jaslowski, Detective Luis Castro, Detective Michael Calise, Detective Barry Schwartz, Officer Machelle Quinones, Officer Antoine Bennet and Officer Brooke Lebel all testified that they heard Kobayashi knock and announce.

[5] Defendant argues that the Plaintiffs witnesses fail the "personal knowledge" requirement of Rule 602 of the Federal Rules of Evidence. The Court agrees with the Plaintiff that their witnesses easily meet the personal knowledge requirement in testifying to events not perceived through one of the five senses. See Los Angeles Times Commc'ns, LLC v. Dept. of the Army, 442 F. Supp. 2d 880, 886 (C.D. Cal. 2006). As more fully discussed below, the Plaintiff points to other cases where courts have permitted testimony by lay witnesses as to what they *did not* perceive. See e.g. Massasoit v. Carter, 439 F. Supp. 2d 463, 477 (M.D.N.C. 2006); Vathekan v. Prince George's County, 154 F.3d 173, 175-76 (4th Cir. 1998); Kopf v. Wing, 942 F.2d 265, 266 (4th Cir. 1991).

[6] Noreen Dows lives behind and diagonal to the Whittier/Diotaiuto household. Their back yards are kittycorner to one another. Mrs. Dows woke up at approximately 5:15 a.m. and was having coffee on her

Rudy Strauss[7] and Nicholas Spatafora[8] testified that they

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back porch when she heard a loud sound like an electrical transformer blowing and saw a bright light. She then investigated and was told that the presence in the backyard was the Sunrise Police. Mrs. Dows then returned to her house where she heard a serious of popping noises. She did not hear anyone knock and announce and she testified in her deposition that she would have been able to hear an officer who loudly announced himself at the Whittier/Diotaiuto front porch. She testified that she has previously heard conversations coming from the driveway and has even heard keys drop on the driveway.

[7] Rudy Strauss lives next door to the Whittier/Diotaiuto household. Mr. Strauss and his wife were standing at their window watching the officers line up at the Whittier/Diotaiuto household. Mr. Strauss testified in his deposition that it is his opinion that he would have been able to hear a knock and announce, if one had occurred, he did not hear one. He only heard a loud bang and saw a flash like a flash bulb on a camera. Mr. Strauss' opinion did not change after he found out that he also did not hear the battering ram break down the Whittier/Diotaiuto front door.

[8] Nicholas Spatafora lives across the street from the Whittier/Diotaiuto household. On August 5, 2005, Mr. Spatafora was standing in his living room ironing his shirt when he heard three or four loud noise that sounded like someone was hitting his parked car with a bat. After about 15-20 seconds, Mr. Spatafora heard a series of sounds like a bunch of firecrackers going on inside the house. Mr. Spatafora testified that he heard no knock or announcement from the police and that had there been a

were listening and would have been able to hear such an announcement if it had occurred. In response, the Defendants seek to introduce testimony by their sound expert, based on sound tests taken during a re-creation of the alleged "knock and announce," suggesting that even if these neighbors had been paying attention, they could not physically have heard the knock and announce.[9] The Plaintiff vigorously disputes the accuracy of this evidence.

Next, the breach team was signaled by Seargent Kobayashi. Officer Goldstein operated the Halligan tool, which is pushed into the door frame and struck with a battering ram until the door opens. Officer Palacio operated the battering ram. Palacio and Goldstein testified that it took about 10-15 second to open the door. After he pried the door open, Officer Goldstein testified that he saw Diotaiuto sitting on the couch.

After the Defendants breached the door, Officer Bruna

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knock and announce he would have heard it. He testified that he has heard even regular conversations coming from the Whittier/Diotaiuto driveway. The results of the expert's sound test did cause Mr. Spatafora to change his testimony.

[9] Sound tests were conducted at Noreen Dows' household and at Nicholas Spatafora's household, but not at Rudy and Jane Strauss' household. These sound tests were not taken at the same time of day, or under the same atmospheric circumstances, as the series of events at issue in this case.

looked into the house,[10] did not see the Defendant, and deployed a flash bang distractive device in the direction of the back bedroom. When the SWAT team entered the house, Diotaiuto was standing in his boxer shorts staring at the police officers. Kobayashi yelled "get on the ground." Instead of complying with the police orders, Diotaiuto began running to the back bedroom of the house, where he kept his weapons. Defendants Bruna and Visners chased Diotaiuto to the back bedroom, and Officer Visners kicked open the door, yelled "police" and followed the suspect inside. Bruna and Visners testified that Diotaiuto entered his closet, racked his gun, came out of the closet holding the gun and pointed it at Visners. Defendants then open fired, aiming at center mass, and were admittedly shooting with the intent to inflict fatal injuries to Diotaiuto. After the initial round of shots, Diotaiuto fell back into the closet. From a seated position, in the closet, both officers testify, and their testimony is uncontradicted, that Diotaiuto began to raise his gun again. Both officers yelled at Diotaiuto to drop the gun, however their commands were disregarded. The officers fired again and Diotaiuto was killed. Officer Visners then stepped on Diotaiuto's hand and Bruna removed the gun and moved it away from Diotaiuto.

The medical examiner and Plaintiff's own forensic pathology expert testified that on autopsy, the decedent

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[10] Despite the fact that the Plaintiff contests this fact, as discussed more fully below, she has advanced no evidence suggesting that the flash bang was thrown either blindly into the house, or intentionally at Diotaiuto. Officer Bruna testified that he looked before he threw the flash-bang and Detective Kevin McDonnell also testified that he saw Bruna look inside the residence prior to deploying the distractive device.

showed no signs of injury from the distraction device. Instead, the decedent died from the fatal gunshot wounds fired by Officers Bruna and Visners. Plaintiff's forensic expert further testified that there was no forensic evidence that contradicted Officers Bruna and Visners testimony. Although the evidence was also consistent with other possible scenarios, it was completely consistent with the officers' testimony. The instant lawsuit, brought by his mother, followed.

II. DISCUSSION

In Count I of the Amended Complaint the Plaintiff alleges that Defendants Bruna and Visners violated Diotaiuto's civil rights by entering his home without knocking and announcing the presence of police officers, that Bruna violated Diotaiuto's civil rights when he deployed a flash-bang distractive device either blindly or directly at Diotaiuto and that Bruna and Visners violated Diotaiuto's civil rights when they used deadly force without probable cause to believe Diotaiuto posed a threat of harm. In their Motion, Bruna and Visners argue that they are entitled to summary judgment because (1) the admissible evidence in this case establishes that Defendant Kobayashi knocked and announced before entering the Plaintiff's residence; and (2) the record is devoid of any evidence that Officer Bruna deployed the flash-bang device blindly or directly at Diotaiuto. The Defendants further argue that they are entitled to qualified immunity because (3) even if Kobayashi failed to knock and announce, Bruna and Visners are nonetheless entitled to qualified immunity because they were not responsible for knocking or announcing their presence; (4) even if the flash-bang were deployed blindly or directly at Diotaiuto this is insufficient, as a matter of law, to establish a Fourth Amendment violation and any such right was not clearly established at the time; and finally (5) Defendants Bruna and Visners are entitled to

qualified immunity because the undisputed evidence establishes that there was at least arguable probable cause that for the officers to believe that Diotaiuto posed a threat to the officers or to others. The Court will address each argument in turn.

A. Summary Judgment Standard

The Court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The stringent burden of establishing the absence of a genuine issue of material fact lies with the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The Court should not grant summary judgment unless it is clear that a trial is unnecessary, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), and any doubts in this regard should be resolved against the moving party, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

The movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp., 477 U.S. at 323. To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support the nonmoving party's case. Id. at 325.

After the movant has met its burden under Rule 56(c), the burden of production shifts and the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). According to the

plain language of Federal Rule of Civil Procedure 56(e), the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings," but instead must come forward with "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); Matsushita, 475 U.S. at 587.

Essentially, so long as the non-moving party has had an ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its claim. Anderson, 477 U.S. at 257. "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party." Walker v. Darby, 911 F.2d 1573, 1577 (11th Cir. 1990). If the evidence advanced by the non-moving party "is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. 242, 249-50 (internal citations omitted). Consideration of a motion for summary judgment, however, "does not lessen the burdens on the non-moving party: the non-moving party still bears the burden of coming forward with sufficient evidence on *each element* that must be proven." Earley v. Champion Int'l Corp., 907 F.2d 1077, 1080 (11th Cir. 1990) (emphasis in original).

B. A Material Dispute of Fact Exists as to whether Defendant Kobayashi Knocked and Announced before entering.

The common-law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is an ancient one. See Wilson v. Arkansas, 514 U.S. 927, 93 1-32 (1995). The Defendants argue that the evidence in this case conclusively proves, as a matter of law, that Kobayashi knocked and announced before

entering the Whittier/Diotaiuto residence to serve the search warrant. Defendants point out that fourteen (14) different officers present on the scene testified that a knock and announce occurred. The Defendants contend that this evidence is uncontroverted. Defendants further argue that the neighbors who testified that they did not hear a knock and announce are insufficient to create a genuine issue of material fact. Defendants base this argument upon the statements of various witnesses that they were either sleeping, inside, or not paying attention at the time of the alleged knock and announce. Defendants also advance expert witness evidence suggesting that none of the neighbors would have been able to hear the knock and announce from where they were positioned even if they were paying close attention.

In response, the Plaintiff contends that a genuine issue of material fact remains with respect to whether the knock and announce occurred because not a single neighbor or witness heard it. Plaintiff points to at least three (3) witnesses who adamantly believe that they were paying attention, in close proximity to the Whittier/Diotaiuto household at a quiet hour of the morning, and if such a knock and announce occurred, they would have heard it. The Court agrees that the Plaintiff has advanced sufficient evidence to create a triable issue of material fact.

Courts have held that the fact that witnesses who were in a position to hear something and did not in fact hear it, would allow a jury reasonably to conclude that the something did not occur. See Vathekan v. Prince George's County, 154 F.3d 173, 180 (4th Cir. 1998) ("If a warning is not given, then a witness will not hear one. A juror could reasonably conclude that if certain witnesses did not hear a warning, then *no* warning was given, even if other witnesses testify to a warning."); Kopf v. Wing, 942 F.2d 265, 267-68 (4th Cir.

1991) (finding that the District Court improperly made determinations of material fact when it discounted civilian witness testimony that they heard no warning given before a police officer released his police dog.); Massasoit v. Carter, 439 F. Supp. 2d 463, 478 (M.D.N.C. 2006) ("In the end, viewing all of the evidence in the light most favorable to plaintiffs, Phelps was in a place where he could have heard Tomeny yelling for him to kill or shoot Butler and he did not hear this. In instances such as this, the Court cannot simply ignore the fact that a witness did not hear something that they should have heard.").

This case is much like the case in Sledd v. Linsday, 102 F.3d 282 (7th Cir. 1996), where the Seventh Circuit found that several triable issues of material fact remained with respect to whether the Plaintiff had suffered a Fourth Amendment violation. In Sledd, the court credited the testimony of the "neighbors in the adjacent duplexes" who "also heard no 'knock and announce' prior to the officers' forced entry into the house." Id. at 286. The court eventually found that:

> [h]ere, there are jury issues on several crucial questions. First, the parties dispute whether the officers announced their presence and warned Sledd that they were police executing a warrant. The police officers have not claimed any exigent circumstances to exempt their actions from the usual 'knock and announce' rule. Sledd introduced testimony from a number of persons that no warnings were given and that the officers were not otherwise identifiable as members of the police department.

Id. at 288. Likewise, in this case the Plaintiff has introduced testimony that none of the neighbors home on the morning of

the incident heard the police knock and announce, and that at least three (3) of these neighbors believe that they were in a position to have heard any such knock or announcement had either occurred. The Defendants may be able to discredit this testimony using their expert's testimony, or otherwise. However, this factual determination is one for the jury and not for the Court. Accordingly, the Court finds that material fact issues remain as to whether Kobayashi knocked and announced the police's presence, as constitutionally required, before entering the Whittier/Diotaiuto household, and therefore his motion for summary judgment must be denied on these grounds.

C. Defendant Bruna is Entitled to Qualified Immunity with Respect to the Charges Regarding the Improper Deployment of the Flash-Bang Device.

Defendants next argue that the evidence conclusively shows that Defendant Bruna looked before he threw the flash-bang and did not throw it directly at Diotaiuto. The Court agrees, the record does not support any conclusion that Bruna deployed the flash-bang in the matter accused by the Plaintiff. Both Officer Bruna and Detective McDonnell testified that Bruna looked into the house before he deployed the device. As evidence that Bruna is lying, Plaintiff points to Officer Goldstein's testimony that he saw Diotaiuto in the living room shortly before Bruna threw the device and Officer Visners' testimony that he saw Diotaiuto shortly after Bruna threw the device. However, the fact that these officers saw the Diotaiuto and Bruna did not does not mean that Bruna did not look at the portion of the room where he was instructed to throw the flash-bang. The evidence advanced by the Plaintiff is entirely insufficient to raise a genuine issue of material fact. The record shows that Diotaiuto showed no signs of injury,

whatsoever, from the distraction device, suggesting that the device did not detonate within any dangerous proximity to Diotaiuto. Plaintiff also points to the fact that there is no specific passage in the written materials indicating that officers should not throw a flash-bang blindly or directly at a subject. Both Defendants Bruna and Kobayashi testified that the training Bruna underwent taught him that under normal circumstances this was an improper manner in which to deploy the device. Accordingly, the uncontradicted evidence in this case conclusively shows that the Defendant did not deploy the flash-bang device in the manner accused by the Plaintiff Accordingly, summary judgment on this claim is appropriate.

D. Qualified Immunity Standard

Qualified immunity is an entitlement not to stand trial or face the burden of litigation, rather than a mere defense to liability. Gonzales v. Reno, 325 F.3d 1228, 1233 (11th Cir. 2003). Whether a public officer is entitled to qualified immunity depends on the specific details of a case, and is a question of law for the Court. Tapley v. Collins, 211 F.3d 1210, 1215 (11th Cir. 2000). "The purpose of this immunity is to allow governmental officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, protecting from suit all but the plainly incompetent or one who is knowingly violating the federal law." Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002) (internal citations omitted). Under the doctrine, "'government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Evans v. Hightower, 117 F.3d 1318, 1320 (11th Cir. 1997) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818

(1982)).

In addressing claims of qualified immunity, the Eleventh Circuit applies the following two-part analysis. "First the defendant government official must prove that he was acting within the scope of his discretionary authority when the alleged wrongful act occurred. If the defendant meets this burden, the plaintiff must then demonstrate that the defendant violated clearly established law based upon objective standards." Evans, 117 F.3d at 1320 (internal citations omitted).

Under the first step of the analysis, as the Court found in its Orders Denying the Defendants' Motions to Dismiss, the officers were undoubtedly engaged in a discretionary function while executing a search warrant. No party disputes this.

Considering the second part of the qualified immunity analysis, a plaintiff must then demonstrate that the defendants violated "clearly established law based on objective standards." Evans, 117 F.3d at 1320 (citing Hartsfield v. Lemacks, 50 F.3d 950, 953 (11th Cir. 1995)). "In order to meet this burden, the plaintiff must demonstrate that the contours of his right were sufficiently clear so that reasonable officers would have understood that their actions violated his rights." Evans, 117 F.3d at 1320 (citing Swint v. City of Wadley, 51 F.3d 988, 995 (11th Cir. 1995) and Anderson v. Creighton, 483 U.S. 635, 640 (1987)). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . , but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Anderson, 483 U.S. at 640 (internal citations omitted); see also Moniz v. City of Fort Lauderdale, 145 F.3d 1278, 1282 (11th Cir. 1998).

The analysis of whether a "clearly established law" was violated also has two steps. Holmes v. Kucynda, 321 F.3d 1069, 1077 (11th Cir. 2003). First, is the "threshold question" of whether the facts as alleged, viewed in the light most favorable to the Plaintiff, would establish a constitutional violation. Id. (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)). "If no constitutional violation is established, then the defendants prevail, and 'there is no necessity for further inquiries concerning qualified immunity." Id. (quoting Saucier, 533 U.S. at 201). However, if a constitutional right would have been violated under the plaintiffs version of the facts, the Court then must determine whether that right was clearly established. Id. The Court will apply this analysis to each of the Defendants specific claims of qualified immunity.

E. Defendants are not Entitled to Qualified Immunity at this Time on the Knock and Announce Claim

With respect to the knock and announce claims, Defendants argue alternatively, that even if a constitutional violation occurred, and no knock and announce took place, they are nonetheless entitled to qualified immunity because they reasonably relied on orders from Defendant Kobayashi in entering the dwelling without first knocking and announcing their presence.

In its Orders Denying Defendants' Goldstein and Palacio's Motions, the Court held that the "state of the law in 2003, much less 2005, certainly gave the officers fair warning that an entry, without knocking and announcing, would be unconstitutional, absent some exceptions." at p. 5 (citing Green v. Butler, 420 F.3d 689, 701 (7th Cir. 2005)), and as more fully explained above, the Court finds that material fact issues remain as to whether a knock and announce occurred in this case. Accordingly, the Defendants do not argue that

this right was not clearly established, nor do they argue that exigent circumstances were present or that knocking or announcing would have proven futile. Rather, they argue that they are entitled to qualified immunity because Defendants Bruna and Visners were not the team leaders nor was knocking and announcing their presence part of their responsibilities in executing the search warrant. Defendants argue that it was reasonable for them to rely on the decision made by their team leader to enter the residence, despite any absence of a knock and announcement.

Several cases, not cited by the Defendants, stand for the proposition that under certain circumstances an officer may be entitled to qualified immunity when following the direct orders of a superior. See Vela v. White, 703 F.2d 147, 152 (5th Cir. 1983) ("Under the circumstances of this case, it would not be fair to force [the defendant] to either violate a direct order or else stop and interrogate [his supervisor] as to the reasons for his order, at the risk of being held liable for damages."); Brent v. Ashley, 247 F.3d 1294, 1306 (11th Cir. 2001) ("Here, the record is devoid of any evidence that would support the conclusion that [the defendants] acted unreasonably [in following their superior's orders]."); Higgins v. Gee, 2008 WL 190493 (M.D. Fla. January 22, 2008) ("the Court notes that there is authority . . . for the proposition that an officer who follows the direct orders of a supervisor in effecting an arrest may be entitled to qualified immunity, *under certain circumstances.")*. However, in each of these cases the courts engaged in a fact intensive inquiry as to whether it was reasonable, under the circumstances, for the officer to rely on such commands of his or her superior. In these cases, it was reasonable for the officers to rely on such commands because the individual officers were not present for all of the events leading up to the alleged constitutional violations and therefore had no reason to doubt the

commands. As the Eleventh Circuit pointed out in Jordan v. Doe, 38 F.3d 1559, 1571 (11th Cir. 1994), it did not "mean to suggest that a defendant is entitled to immunity merely upon proof that he or she was acting pursuant to orders. This is not and should not be the law." Instead, the Court finds that cases cited by the Defendants establish that the inquiry turns on whether or not it was *reasonable,* under the circumstances, for the officer to rely on the commands of his or her superior.

Issues of fact remain as to whether the it was reasonable for Officers Bruna and Visners to rely on Kobayashi's orders to enter the dwelling without a proper knock and announce. The Court agrees, however, with the Fifth Circuit in Hodge v. Laryisson, 226 F.3d 642; 2000 WL 1029029 *2 (5th Cir. 2000) (unpublished opinion), that not every law enforcement officer is required to knock and announce. The Court also agrees that an officer should not be expected to question his or her supervisor's orders in a police paramilitary operation when split second decisions are made in the field, and any delay could endanger the lives of the other officers present. See Graham v. Connor, 490 U.S. 386, 396-97 (1989) ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving. . ."). It would be reasonable for an officer to rely on their supervisor's split second decision that circumstances have changed and a knock-and-announce is no longer required. Here, however, no one argues that this was the case. What is more, in this ease there is a material issue of fact as to whether the police are lying concerning whether a knock and announce actually occurred, especially considering Kobayashi's prior sworn statement that Officers Palacio and Goldstein actually executed the knock and announce. Accordingly, if the jury determines that the police officers are lying and that no knock and announce in fact occurred, they

may be able to circumstantially infer that they lied about any prior knowledge of the intent of the SWAT operation to dispense with the knock and announcement altogether. If the Defendants were involved in, or privy to, any prior determination that no knock and announce was to occur in this case, despite being constitutionally required, then any reliance on orders given by Kobayashi was misplaced and any grant of qualified immunity is inappropriate.

In this case, Defendants Bruna and Visners were present for all of the events leading up to the forced entry and nobody claims that there were any exigent circumstances or that a knock and announce was not required. Defendants Bruna and Visners were also informed of the operational plan ahead of time and were briefed prior to the execution of the warrant.[11] This operational plan called for a knock and announce. No reason has been given for the change in plans, should the jury find that no knock and announce occurred. Accordingly, while it would have been reasonable under the circumstances for Defendants Bruna and Visners to rely on Kobayashi's command to enter without first knocking and announcing if such a determination were a splitsecond decision made during the execution of the warrant. Such reliance, however, would not be reasonable if the Defendants had prior knowledge of the intention to dispense with the knock and announce requirement. Because the jury could infer from circumstantial evidence that the officers have fabricated their story, qualified

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[11] Accordingly, this case is distinguishable from Hodge, 226 F.3d 642, because in that case there was no evidence that the "tag-along" officer was privy to any of the operational plans. Accordingly, it would have been more reasonable for this officer to rely on the representation of his supervising officer that a knock and announce could be dispensed with.

immunity is not appropriate at this time absent further factual findings by the jury.[12] The law was clearly established at the time that entering a dwelling without first knocking and announcing, absent exigent circumstances, violates the Fourth Amendment of the Constitution. If the Defendants knowingly did not abide by this constitutional requirement they can be held liable.

The Court is cognizant that qualified immunity is an entitlement not to stand trial or face the burden of litigation, rather than a mere defense to liability, Gonzales, 325 F.3d at 1233, and therefore should be granted at the earliest possible point in the case, Id.; Parrish v. Nikolits, 86 F.3d 1088, 1094 (11th Cir. 1996). While the Court takes this responsibility seriously, because the Court finds that issues of fact remain with respect to the circumstances surrounding any failure to knock and announce, the Defendants are not entitled to qualified immunity on this issue at this time and their motion must be denied pending further factual determinations by the jury.

F. Even if Bruna Deployed the Flash-Bang Device Blindly or Directly at Diotaiuto, He is Nonetheless Entitled to Qualified Immunity.

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[12] At trial, the Defendants may argue alternatively that they are entitled to qualified immunity because their reliance was reasonable and request a special interrogatory verdict form at the charge conference. The Court may use these factual findings to grant qualified immunity at this point, as a mailer of law, if the jury's factual findings show that such immunity is warranted. See Priester v. City of Riviera Beach, 208 F.3d 919, 926 (11th Cir. 2000).

Despite the fact that the Court has already held that the record does not support any conclusion that officer Bruna threw the flash-bang device either blindly or directly at Diotaiuto, the Court will, in an abundance of caution, address Defendant Bruna's qualified immunity claim. Defendant Bruna argues alternatively that *even if* the facts claimed by the Plaintiff were true, he would nonetheless be entitled to qualified immunity. The Court agrees.

As the Defendants point out, courts have repeatedly upheld the use of distraction devices for high risk warrants so long as not deployed in a dangerous manner, around innocent bystanders, the elderly or small children. See e.g. United States v. Boulanger, 444 F.3d 76, 85 (1st Cir. 2006) (noting that "the police planned the search after determining that there were no children or elderly people in the apartment."); Molina v. Cooper, 325 F.3d 963, 973 (7th Cir. 2003) (considering the fact that the "flash bang devices were not used in the presence of Jackie or the children."); Waller v. Citty of Danville, 212 Fed. Appx. 162, 166 (4th Cir. 2006). These cases upholding the use of flash-bang devices include cases in the Eleventh Circuit. See e.g. United States v. Baker, 16 F.3d 854, 856 (11th Cir. 1994) (finding the use of the distractionary device was appropriate where intelligence showed that the door was barricaded and two dobermans awaited inside). The Court recognizes that there is case law from other circuits holding that *under certain circumstances,* and despite the fact that a suspect was known to be armed or violent, the use of a flash bang device constitute a constitutional violation. However, those cases nearly all involve circumstances not present here; namely the presence of children, the elderly and innocent bystanders. See United States v. Jones, 214 F.3d 836, 838 (7th Cir. 2000) (finding in dicta that the use of the flash-bang device was unreasonable under the circumstances of the case because a 6-year-old child lived in the apartment); Boyd v.

Benton County, 374 F.3d 773, 779 (9th Cir. 2004) (finding that the blind deployment of a flash bang device into a dwelling where multiple innocent bystanders were suspected to be present was unreasonable). Additionally, at least one district court has held that it is unconstitutional to intentionally deploy a flash-bang device directly at a suspect. Taylor v. City of Middletown, 436 F. Supp. 2d 377, 378 (D. Conn. 2006). Accordingly, while the Court agrees that there are certain factual scenarios, not present here, where the deployment of a flash bang device could be unconstitutional, even under those sets of facts the Plaintiff has not cited to a single Eleventh Circuit case holding the use of a flash bang device to be unconstitutional. Belcher v. City of Atlanta, 30 F.3d 1390, 1400(11th Cir. 1994) (holding that non-binding authorities cannot settle the law in the Eleventh Circuit for purposes of qualified immunity). Accordingly, the Court finds that even under facts more favorable to the Plaintiff than those present here, Defendant Bruna is nonetheless entitled to qualified immunity and his motion for summary judgment must be granted on these grounds.

E. Defendants Bruna and Visners are Entitled to Qualified Immunity with Respect to the Plaintiff's Fourth Amendment Excessive Force Claims

Finally, Defendants argue that based on the undisputed facts in the record they are entitled to qualified immunity on the Plaintiffs excessive force claims. The Court agrees.

The Supreme Court held in Graham v. Connor, 490 U.S. 386 (1989), that all claims that law enforcement officers have used excessive force in the course of an arrest, or other 'seizure' of a free citizen must be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach. Graham, 490

U.S. at 395. In making the determination of reasonableness it is important that a "reviewing court judge consider the use of force 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight' and refrain from slipping into the role of a Monday-morning quarterback" Fernandez v. City of Cooper City, 207 F. Supp. 2d 1371, 1377 (S.D. Fla. 2002). As previously mentioned, this is because "the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain and rapidly evolving -- about the amount of force that is necessary in a particular situation." Id. (quoting Graham, 490 U.S. at 396-97). Courts are "loath to second-guess the decisions made by police officers in the field." Vaughan v. Cox, 343 F.3d 1323, 1331 (11th Cir. 2003) (citing Graham, 490 U.S. at 396-97).

This case involves the most serious kind of "seizure," that by use of deadly force. hi the Eleventh Circuit,

> "[d]eadly force is 'reasonable' for the purposes of the Fourth Amendment when an officer (1) has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others or that he has committed a crime involving the infliction or threatened infliction of serious physical harm; (2) reasonably believes that the use of deadly force was necessary to prevent escape; and (3) has given some warning about the possible use of deadly force, if feasible."

Robinson v. Arrugueta, 415 F.3d 1252, 1255 (11th Cir. 2005) (internal citations and quotations omitted). When an officer is confronted with an individual who threatens the officer with a deadly weapon, or even what the officer perceives to be a

weapon, the officer is entitled to use deadly force. See e.g. Menuel v. City of Atlanta, 25 F.3d 990, 996 (11th Cir. 1994); Linder v. Richmond County, Ga., 844 F. Supp. 764, 767 (S.D. Ga. 1994); Elliott v. Leavitt, 99 F.3d MO, 643-44 (4th Cir. 1996) ("No citizen can fairly expect to draw a gun on police without risking tragic consequences. And no court can expect any human being to remain passive in the face of an active threat on his or her life."), In this case, the testimony of the officers in the room at the time of the shooting is undisputed. The testimony is that Diotaiuto pointed his gun at the officers before the first round of shots, and despite suffering gunshot wounds during the first round of shooting, raised his gun against the officers again causing the Defendants to launch a second round of shots, causing the fatal wounds.[13] We will never know what would have occurred had the officers not shot Diotaiuto, however, as the court in Elliott held, no court should "require police officers to wait until a suspect shoots to confirm that a serious threat of harm exists." 99 F.3d at 643. Accordingly, at the time of the shooting, the Defendants conduct did not violate the decedent's constitutional rights.

Plaintiff argues, however, that the Court must look beyond the time of the shooting and consider the "totality of the circumstances," which, on her reading, would include the manner in which the Defendants executed the search warrant. The Plaintiff cites to Garrett v. Athens-Clark County, Ga., for

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[13] The Plaintiff cites to a line of cases holding that an officer may not use gratuitous force against a person who has already been subdued. See Skiritch v. Thornton, 280 F.3d 1295, 1303 (11th Cir. 2002). However, the undisputed testimony shows that Diotaiuto continued to point his gun at the Defendants even after the first round of shooting. The Court cannot hold, therefore, that the decedent had been rendered incapacitated.

the proposition that the Court must consider the "totality of the circumstances" in determining whether any Fourth Amendment violation was committed. 378 F.3d 1274, 1281 (11th Cir. 2004) ("In analyzing whether excessive force was used, courts must look at the totality of the circumstances: not just a small slice of the acts that happened at the tail of the story.").

However, the Court does not believe that Garrett stands for the proposition for which it is advanced. The "totality of the circumstances" in Garrett included the circumstances at the time of the seizure and the time immediately prior to the seizure when the police were attempting to seize Garrett. In Garrett the Eleventh Circuit noted that

> [the decedent] repeatedly placed officers' lives and innocents' lives in danger by engaging the police in a multi-county vehicle chase that did not end until [the decedent] had crashed *twice*. Once [the decedent's] truck was finally stopped, the officers tried to restrain him in a less restrictive manner (simple handcuffing), but [the decedent] ran and fought with the police and kept on violently kicking and resisting."

Garrett, 378 F.3d at 1274. However, according to Menuel v. Atlanta, 25 F.3d 990, 995 (11th Cir. 1994), an officer's pre-seizure conduct is not relevant to the determination of the officers reasonableness in utilizing deadly force. In Menuel, the court refused to consider police conduct that occurred prior to the seizure after the police pursued a course of action that was perhaps not the most prudent. Id. The Court believes, that these cases, read together, stand for the proposition that the "totality of the circumstances," which the Court is instructed to consider are the circumstances that occur during the course of the seizure and those immediately prior to the

seizure while the officers are attempting to effectuate an arrest or detention. See Scheuerman v. City of Huntsville, 499 F. Supp. 2d 1205, 1219 (N.D. Ala. 2007) ("the reasonableness inquiry depends only upon the officers knowledge of circumstances immediately prior to and at the moment he made the decision to employ deadly force."). These circumstances do not include the officers tactical plan in effecting a search warrant. No Fourth Amendment violation can occur until the time of the seizure and police conduct prior to that point should not be considered in addressing a claim of excessive force.[14] Other circuits have also adopted this rule. Waller v. Citty of Danville, 212 Fed. Appx. 162, 171 (4th Cir. 2006) (holding that pre-shooting context "is generally not relevant and is inadmissible."); Carter v. Buscher, 973 F.2d 1328, 1332 (7th Cir. 1992) ("pre-seizure conduct is not subject to Fourth Amendment scmtiny."); Whitlow v. City of Louisville, 39 Fed. Appx. 297, 303 (6th Cir. 2002) ("When analyzing claims of excessive force, this Court has adopted the view of doing so in segments."). In this

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[14] This is not to say that officers' pre-shooting behavior cannot constitute an independent constitutional violation. The Plaintiff may claim as damages all of the results proximately caused by the Defendants' pre-shooting constitutional violation, if any. Jackson v. Sauls, 206 F.3d 1156, 1168 (11th Cir. 2000) ("Although § 1983 addresses only constitutional torts, § 1983 defendants are, as in common law suits, responsible for the natural and foreseeable consequences of their actions"). "For damages to be proximately caused by a constitutional tort, a plaintiff must show that, except for that constitutional tort, such injuries and damages would not have occurred and further that such injuries and damages were the reasonably foreseeable consequences of the tortious acts or omissions in issue." Id. at 1168.

case, as in Menuel, the seizure did not happen until the time of the shooting, and accordingly because, under the "totality of the circumstances," the Defendants' conduct was reasonable at the time of the seizure, the Defendants are entitled to qualified immunity on the Plaintiffs excessive force claims. Alternatively, even if the Court were to consider Plaintiffs "totality of the circumstances", this Court might, at a Rule 50 motion, find the officers to be entitled to qualified immunity on the excessive force claims.

III. CONCLUSION

Accordingly, for the foregoing reasons, it is **ORDERED AND ADJUDGED** as follows:

1. Defendants Andre Bruna and Sean Visners' Motion for Summary Judgment [DE 143] is hereby **GRANTED in part** and **DENIED in part**;

2. Summary Judgment is granted in favor of Defendants Bruna and Visners with respect to the Plaintiff's Fourth Amendment excessive force claims;

3. Summary Judgment is granted in favor of Defendant Bruna with respect to the Plaintiff's claims relating to the improper deployment of the flash-bang device;

4. Summary Judgment is denied with respect to all claims related to the failure to knock and announce.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 13th day of May, 2008.

/s/ William P. Dimitrouleas
WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-60476-CIV-DIMITROULEAS
Magistrate Judge Rosenbaum

MARLENE WHITTIER, as Personal Representative for the Estate of ANTHONY DIOTAIUTO, deceased and individually,

Plaintiff,

vs.

CITY OF SUNRISE, a Municipality of the State of Florida, ANDRE BRUNA, individually, SEAN VISNERS, individually, DAVID BOYETT, individually, DANIEL KOBAYASHI, individually, ERIC GOLDSTEIN, individually, and ERIK PALACIO, individually,

Defendants.

ORDER DENYING DEFENDANTS ERIC GOLDSTEIN AND ERIK PALACIO'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court upon Defendants, Eric Goldstein and Erik Palacio's Motion for Summary Judgment [DE 139]. The Court has carefully considered the Motion, Defendants' Statement of Undisputed Material Facts [DE 140], Plaintiffs Response [DE 157], Plaintiffs Omnibus Statement of Material Facts and Controverted Facts [DE 153], Defendant's Reply [DE 171] the parties attached exhibits and depositions and is otherwise fully advised in the premises.

I. BACKGROUND

On April 11, 2007 the Plaintiff Marlene Whittier ("Plaintiff"), as Personal representative of her son Anthony Diotaiuto ("Diotaiuto"), and individually, filed a seven count Amended Complaint against Defendant Officers Eric Goldstein ("Goldstein"), Erik Palacio ("Palacio"), the City of Sunrise ("City"), Officer Sean Visners ("Visners"), Chief David Boyett[1] Officer Andre Bruna ("Bruna") and Officer Daniel Kobayashi ("Kobayashi") [DE 9]. Plaintiffs son was shot to death by a police SWAT unit executing a search warrant in the early morning of August 5, 2005.

Early in the morning on August 5, 2005, the SWAT team was briefed, and received an operational plan, before executing a search warrant. The target of the search warrant was the Whittier/Diotaiuto home, located at 8500 N.W. 24th Court, Sunrise, Florida. The operational plan utilized an eight (8) man SWAT team to execute the warrant, called for the team leader to knock and announce prior to entry and called for the deployment of a flash-bang distraction device[2] before entry. Kobayashi was the SWAT supervisor and team leader. The SWAT team was dressed in full SWAT gear with the word "police" written on their uniforms. All members of the

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[1] On August 20, 2007 the Court granted Defendant David Boyett's Motion to Dismiss [DE 54].

[2] A flash-bang distractionary device is a "light/sound diversionary device designed to emit a brilliant light and loud noise upon detonation. Its purpose is to stun, disorient, and temporarily blind its targets, creating a window of time in which police officers can safely enter and secure a potentially dangerous area." Boyd v. Benton County, 374 F.3d 773, 776 (9th Cir. 2004).

SWAT team had attended extensive training and had been instructed that flash-bang devices should not be thrown directly at individuals. Palacio and Goldstein made up the breach team and were responsible for forcibly opening the residence door if necessary. Officer Bruna was responsible for deploying the flash-bang device.

According to police allegations, Diotaiuto was a known drug dealer. Investigations into Diotaiuto's drug activity lead to the eventual issuance of a search warrant. Intelligence also revealed that Diotaiuto had a concealed weapons permit and carried a handgun on him at all times. Additional intelligence advised that he kept a loaded shot-gun in the master bedroom closet of his home. Based on this information, the warrant service was labeled "high risk" which the City defines as "involving acts of violence or potential acts of violence." The City utilizes a SWAT team in the service of all "high risk" warrants.

Just after 6:00 in the morning on August 5, 2005 the SWAT team approached the door of the Whittier/Diotaiuto household. According to the testimony of the officers, Kobayashi approached the door, knocked loudly several times and announced the presence of the Sunrise Police and the search warrant. Fourteen (14) police officers present at the scene testified that they heard Kobayashi knock and announce.[3] Only a single officer, Officer Bettencourt, did not

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[3] Defendant Officer Erik Palacio, Defendant Officer Eric Goldstein, Defendant Officer Sean Visners, Defendant Officer Andre Burna, Defendant Sergeant Daniel Kobayashi, Officer Kevin McDonnell, Lieutenant Charles Vitale, Officer John Jaslowski, Detective Luis Castro, Detective Michael Calise, Detective Barry Schwartz, Officer Machelle Quinones, Officer Antoine

hear the knock and announce. Despite the fact that nearly every officer present heard a loud and forceful, knock and announce, not a single neighbor heard a knock or an announcement of the police presence. At least three neighbors, Noreen Dows,[4] Rudy Strauss[5] and Nicholas

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Bennet and Officer Brooke Lebel all testified that they heard Kobayashi knock and announce.

[4] Noreen Dows lives behind and diagonal to the Whittier/Diotaiuto household. Their back yards are kitty-corner to one another. Mrs. Dows woke up at approximately 5:15 am, and was having coffee on her back porch when she heard a loud sound like an electrical transformer blowing and saw a bright light. She then investigated and was told that the presence in the backyard was the Sunrise Police. Mrs. Dows then returned to her house where she heard a serious of popping noises. She did not hear anyone knock and announce and she testified in her deposition that she would have been able to hear an officer who loudly announced himself at the Whittier/Diotaiuto front porch. She testified that she has previously heard conversations coming from the driveway and has even heard keys drop on the driveway.

[5] Rudy Strauss lives next door to the Whittier/Diotaiuto household. Mr. Strauss and his wife were standing at their window watching the officers lined up at the Whittier/Diotaiuto household. Mr. Strauss testified in his deposition that it is his opinion that he would have been able to hear a knock and announce, if one had occurred, he did not hear one. He only heard a loud bang and saw a flash like a flash bulb on a camera. Mr. Strauss' opinion did not change after he found out that he also did not hear the battering ram break down the Whittier/Diotaiuto

Spatafora[6] testified that they were listening and would have been able to hear such an announcement if it had occurred. In response, the Defendants seek to introduce testimony by their sound expert, based on sound tests taken during a re-creation of the alleged "knock and announce," suggesting that even if these neighbors had been paying attention, they could not physically have heard the knock and announce.[7] The Plaintiff vigorously disputes the accuracy of this evidence.

Next, the breach team was signaled by Sergent Kobayashi. Officer Goldstein operated the Halligan tool, which is pushed into the door frame and struck with a battering ram until the

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front door.

[6] Nicholas Spatafora lives across the street from the Whittier/Diotaiuto household. On August 5, 2005, Mr. Spatafora was standing in his living room ironing his shirt when he heard three or four loud noise that sounded like someone was hitting his parked car with a bat. After about 15-20 seconds, Mr. Spatafora heard a series of sounds like a bunch of firecrackers going on inside the house. Mr. Spatafora testified that he heard no knock or announcement from the police and that had there been a knock and announce he would have heard it. He testified that he has heard even regular conversations coming from the Whittier/Diotaiuto driveway. The results of the expert's sound test did cause Mr. Spatafora to change his testimony.

[7] Sound tests were conducted at Noreen Dows' household and at Nicholas Spatafora's household, but not at Rudy and Jane Strauss' household. These sound tests were not taken at the same time of day, or under the same atmospheric circumstances, as the series of events at issue in this case.

door opens. Officer Palacio operated the battering ram. Palacio and Goldstein testified that it took about 10-15 second to open the door. After he pried the door open, Officer Goldstein testified that he saw Diotaiuto sitting on the couch.

After the Defendants breached the door, Officer Bruna looked into the house,[8] did not see the Defendant, and deployed a flash bang distractive device in the direction of the back bedroom. When the SWAT team entered the house, Diotaiuto was standing in his boxer shorts staring at the police officers. Kobayashi yelled "get on the ground." Instead of complying with the police orders, Diotaiuto began running to the back bedroom of the house, where he kept his weapons. Defendants Bruna and Visners chased Diotaiuto to the back bedroom, and Officer Visners kicked open the door and followed the suspect inside. Bruna and Visners testified that Diotaiuto grabbed his gun, racked it and pointed it at them. Both officers were yelling at Diotaiuto to put the gun down. Two rounds of shots were fired, and Diotaiuto was killed. The medical examiner and Plaintiffs own forensic pathology expert testified that on autopsy, the decedent showed no signs of injury from the distraction device. Instead, the decedent died from the fatal gunshot wounds fired by Officers Bruna and Visners. The instant lawsuit, brought by his mother, followed.

II. DISCUSSION

The only claim alleged against Defendants Goldstein and Palacio is under 42 U.S.C. § 1983, pursuant to the Fourth

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[8] **Despite the fact that the Plaintiff contests this fact, as discussed more fully below, she has advanced no evidence suggesting that the flash bang was thrown either blindly into the house, or intentionally at Diotaiuto.**

Amendment, in Count III of the Complaint based on a failure to knock and announce. In their Motion, Defendants Goldstein and Palacio argue that they are entitled to summary judgment because: (1) the admissible evidence in this case establishes that Defendant Kobayashi did knock and announce before entering the Plaintiffs residence or (2) *even if* Kobayashi did not knock and announce, they are still entitled to qualified immunity because it was not their responsibility or duty to knock and announce and therefore their behavior was objectively reasonable under the circumstances. The Court will address each argument in turn.

A. Summary Judgment Standard

The Court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The stringent burden of establishing the absence of a genuine issue of material fact lies with the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The Court should not grant summary judgment unless it is clear that a trial is unnecessary, see Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 255 (1986), and any doubts in this regard should be resolved against the moving party, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

The movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp., 477 U.S. at 323. To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support the nonmoving party's case. Id. at 325.

After the movant has met its burden under Rule 56(c), the burden of production shifts and the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). According to the plain language of Federal Rule of Civil Procedure 56(e), the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings," but instead must come forward with "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); Matsushita, 475 U.S. at 587.

Essentially, so long as the non-moving party has had an ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its claim. Anderson, 477 U.S. at 257. "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party." Walker v. Darby, 911 F.2d 1573, 1577 (11th Cir. 1990). If the evidence advanced by the non-moving party "is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. 242, 249-50 (internal citations omitted). Consideration of a motion for summary judgment, however, "does not lessen the burdens on the non-moving party: the non-moving party still bears the burden of coming forward with sufficient evidence on *each element* that must be proven." Earley v. Champion Int'l Corp., 907 F.2d 1077, 1080 (11th Cir. 1990) (emphasis in original).

B. A Material Dispute of Fact Exists as to whether Defendant Kobayashi Knocked and Announced before entering.

The common-law principle that law enforcement officers

must announce their presence and provide residents an opportunity to open the door is an ancient one. See Wilson v. Arkansas, 514 U.S. 927, 931-32 (1995). The Defendants argue that the evidence in this case conclusively proves, as a matter of law, that Defendant Kobayashi knocked and announced before entering the Whittier/Diotaiuto residence to serve the search warrant. Defendants point out that fourteen (14) different officers present on the scene testified that a knock and announce occurred. The Defendants argue that this evidence is uncontroverted. Defendants argue that the neighbors who testified that they did not hear a knock and announce are insufficient to create a genuine issue of material fact. Defendants base this argument upon the statements of various witnesses that they were either sleeping, inside, or not paying attention at the time of the alleged knock and announce. Defendants also advance expert witness evidence suggesting that none of the neighbors would have been able to hear Kobayashi's knock and announce from where they were positioned even if they were paying close attention.

In response, the Plaintiff contends that a genuine issue of material fact remains with respect to whether the knock and announce occurred because not a single neighbor or witness heard it. Plaintiff points to at least three (3) witnesses who adamantly believe that they were paying attention, in close proximity to the Whittier/Diotaiuto household at a quiet hour in the morning, and if such a knock and announce occurred, they would have heard it. The Court agrees that the Plaintiff has advanced sufficient evidence to create a triable issue of material fact.

Courts have held that the fact that witnesses who were in a position to hear something did not in fact hear it, would allow a jury reasonably to conclude that the something did not occur. See Vathekan v. Prince George's County, 154 F.3d

173, 180 (4th Cir. 1998) ("If a warning is not given, then a witness will not hear one. A juror could reasonably conclude that if certain witnesses did not hear a warning, then *no* warning was given, even if other witnesses testify to a warning."); Kopf v. Wing, 942 F.2d 265, 267-68 (4th Cir. 1991) (finding that the District Court improperly made determinations of material fact when it discounted civilian witness testimony that they heard no warning given before a police officer released his police dog.); Massasoit v. Carter, 439 F. Supp. 2d 463,478 (M.D.N.C. 2006) ("In the end, viewing all of the evidence in the light most favorable to plaintiffs, Phelps was in a place where he could have heard Tomeny yelling for him to kill or shoot Butler and he did not hear this. In instances such as this, the Court cannot simply ignore the fact that a witness did not hear something that they should have heard.").

This case is much like the case in Sledd v. Linsday, 102 F.3d 282 (7th Cir. 1996), where the Seventh Circuit found that several triable issues of material fact remained with respect to whether the Plaintiff had suffered a Fourth Amendment violation. In Sledd, the court credited the testimony of the "neighbors in the adjacent duplexes" who "also heard no 'knock and announce' prior to the officers' forced entry into the house." Id. at 286. The court eventually found that:

> [h]ere, there are jury issues on several crucial questions. First, the parties dispute whether the officers announced their presence and warned Sledd that they were police executing a warrant. The police officers have not claimed any exigent circumstances to exempt their actions from the usual 'knock and announce' rule. Sledd introduced testimony from a number of persons that no warnings were given and

> that the officers were not otherwise identifiable as members of the police department.

Id. at 288. Likewise, in this case the Plaintiff has introduced testimony that none of the neighbors home on the morning of the incident heard the police knock and announce, and that at least three (3) of these neighbors believe that they were in a position to have heard any such knock or announcement had either occurred. The Defendants may be able to discredit this testimony using their expert, or otherwise. However, this factual determination is one for the jury and not for the Court. Accordingly, the Court finds that material fact issues remain as to whether the Defendants knocked and announced their presence, as constitutionally required, before entering the Whittier/Diotaiuto household.

C. Qualified Immunity

Alternatively, Defendants argue that even if a constitutional violation occurred, and no knock and announce took place, they are nonetheless entitled to qualified immunity because they reasonably relied on orders from Defendant Kobayashi in entering the dwelling without first knocking and announcing their presence.

Qualified immunity is an entitlement not to stand trial or face the burden of litigation, rather than a mere defense to liability. Gonzales v. Reno, 325 F.3d 1228, 1233 (11th Cir. 2003). Whether a public officer is entitled to qualified immunity depends on the specific details of a case, and is a question of law for the Court. Tapley v. Collins, 211 F.3d 1210, 1215 (11th Cir. 2000). "The purpose of this immunity is to allow governmental officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, protecting from suit all but the plainly

incompetent or one who is knowingly violating the federal law." Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002)(internal citations omitted). Under the doctrine, "'government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Evans v. Hightower, 117 F.3d 1318, 1320 (11th Cir. 1997) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

In addressing claims of qualified immunity, the Eleventh Circuit applies the following two-part analysis. "First the defendant government official must prove that he was acting within the scope of his discretionary authority when the alleged wrongful act occurred. If the defendant meets this burden, the plaintiff must then demonstrate that the defendant violated clearly established law based upon objective standards." Evans, 117 F.3d at 1320 (internal citations omitted).

Under the first step of the analysis, as the Court found in its Order Denying the Defendants' Motion to Dismiss [DE 52], "[u]nder this standard, Defendants Goldstein and Palacio, as a matter of law, were undoubtedly engaged in a discretionary function when they participated in serving the search warrant." at p. 4. No party disputes this.

Considering the second part of the qualified immunity analysis, the plaintiff must then demonstrate that the Defendants violated "clearly established law based on objective standards." Evans, 117 F.3d at 1320 (citing Hartsfield v. Lemacks, 50 F.3d 950, 953 (11th Cir. 1995)). "In order to meet this burden, the plaintiff must demonstrate that the contours of his right were sufficiently clear so that

reasonable officers would have understood that their actions violated his rights." Evans, 117 F.3d at 1320 (citing Swint v. City of Wadley, 51 F.3d 988, 995 (11th Cir. 1995) and Anderson v. Creighton, 483 U.S. 635, 640 (1987)). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . ., but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Anderson, 483 U.S. at 640 (internal citations omitted); see also Moniz v. City of Fort Lauderdale, 145 F.3d 1278, 1282 (11th Cir. 1998).

The analysis of whether a "clearly established law" was violated also has two steps. Holmes v. Kucynda, 321 F.3d 1069, 1077 (11th Cir. 2003). First, is the "threshold question" of whether the facts as alleged, viewed in the light most favorable to the Plaintiff, would establish a constitutional violation. Id. (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)). "If no constitutional violation is established, then the defendants prevail, and 'there is no necessity for further inquiries concerning qualified immunity." Id. (quoting Saucier, 533 U.S. at 201). However, if a constitutional right would have been violated under the plaintiffs version of the facts, the Court then must determine whether that right was clearly established. Id.

In its Order Denying Defendants Motion to Dismiss, the Court held that the "state of the law in 2003, much less 2005, certainly gave the officers fair warning that an entry, without knocking and announcing, would be unconstitutional, absent some exceptions." at p. 5 (citing Green v. Butler, 420 F.3d 689, 701 (7th Cir. 2005)), and as more fully explained above, the Court finds that material fact issues remain as to whether a knock and announce occurred in this case. Accordingly, the Defendants do not argue that this right was not clearly

established, nor do they argue that exigent circumstances were present or that knocking or announcing would have proven futile. Rather, they argue that they are entitled to qualified immunity because Defendants Goldstein and Palacio were merely the breach team. They were not the team leaders nor was knocking and announcing their presence part of their responsibilities in executing the search warrant. Defendants argue that as the breach team, it was reasonable for them to rely on the decision made by their team leader to open the door, despite any absence of a knock and announcement.

Defendants cite to several[9] cases that stand for the proposition that under certain circumstances an officer may be entitled to qualified immunity when following the direct orders of a superior. See Vela v. White, 703 F.2d 147, 152 (5th Cir. 1983) ("Under the circumstances of this case, it would not be fair to force [the defendant] to either violate a direct order or else stop and interrogate [his supervisor] as to the reasons for his order, at the risk of being held liable for damages."); Brent v. Ashley, 247 F.3d 1294, 1306 (11th Cir. 2001)("Here, the record is devoid of any evidence that would support the conclusion that [the defendants] acted unreasonably [in following their superior's orders]."); Higgins v. Gee, 2008 WL 190493 (M.D. Fla. January 22, 2008) ("the Court notes that there is authority.. for the proposition that an officer who follows the direct orders of a supervisor in effecting an arrest may be entitled to qualified immunity, *under certain circumstances.")*. However, none of the cases

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[9] Despite Defendants' representation that the Eleventh Circuit "adopted" the reasoning of Vela v. White, 703 F.2d 147, 152 (5th Cir. 1983), in Jordan v. Doe, 38 F.3d 1559 (11th Cir. 1994), Vela was only cited in the dissent, and was not mentioned in the Eleventh Circuit's majority opinion.

stand for the proposition for which they are advanced. In each of these cases the courts engaged in a fact intensive inquiry as to whether it was reasonable, under the circumstances, for the officer to rely on such commands of his or her superior. In these cases, it was reasonable for the officers to rely on such commands because the individual officers were not present for all of the events leading up to the alleged constitutional violations and therefore had no reason to doubt the commands. As the Eleventh Circuit pointed out in Jordan v. Doe, 38 F.3d 1559, 1571 (11th Cir. 1994), it did not "mean to suggest that a defendant is entitled to immunity merely upon proof that he or she was acting pursuant to orders. This is not and should not be the law." Instead, the Court finds that cases cited by the Defendants establish that the inquiry turns on whether or not it was *reasonable,* under the circumstances, for the officer to rely on the commands of his or her superior.

Issues of fact remain as to whether the [sic] it was reasonable for Officers Palacio and Goldstein to rely on the orders of Kobayashi to enter the dwelling without a knock and announce. The Court agrees, however, with the Fifth Circuit in Hodge v. Laryisson, 226 F.3d 642; 2000 WL 1029029 *2 (5th Cir 2000) (unpublished opinion), that not every law enforcement officer is required to knock and announce. The Court also agrees that an officer should not be expected to question his or her supervisor's orders in a police paramilitary operation when split second decisions are made in the field, and any delay could endanger the lives of the other officers present. See Graham v. Connor, 490 U.S. 386, 396-97 (1989) ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving. . ."). It would be reasonable for an officer to rely on their supervisor's split second decision that circumstances have changed and a knock-and-

announce is no longer required. Here, however, no one argues that this was the case. What is more, in this case there is a material issue of fact as to whether the police are lying concerning whether a knock and announce actually occurred. Accordingly, if the jury determines that the police officers are lying and that no knock and announce in fact occurred, they may be able to circumstantially infer that they lied about any prior knowledge of the intent of the SWAT operation to dispense with the knock and announcement altogether. If the Defendants were involved in, or privy to, any prior determination that no knock and announce was to occur in this case, despite being constitutionally required, then any reliance on orders given by Kobayashi was misplaced and any grant of qualified immunity would be inappropriate.

In this case, Defendants Goldstein and Palacio were present for all of the events leading up to the forced entry and nobody claims that there were any exigent circumstances or that a knock and announce was not required. Defendants Goldstein and Palacio were also informed of the operational plan ahead of time and were present for the briefing prior to the execution of the warrant.[10] This operational plan called for a knock and announce. No reason has been given for the change in plans, should the jury find that no knock and announce occurred. Accordingly, while it would have been reasonable under the circumstances for Defendants Goldstein and Palacio to rely on Kobayashi's command to enter without

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[10] Accordingly, this case is distinguishable from Hodge, 226 F.3d 642, because in that case there was no evidence that the "tag-along" officer was privy to any of the operational plans. Accordingly, it would have been more reasonable for this officer to rely on the representation of his supervising officer that a knock and announce could be dispensed with.

first knocking and announcing if such a determination were a split-second decision made during the execution of the warrant. Such reliance, however, would not be reasonable if the Defendants had prior knowledge of an intention to improperly dispense with the knock and announce requirement. Because the jury could infer from circumstantial evidence that the officers have fabricated their story, qualified immunity is not appropriate at this time absent further factual findings by the jury.[11] The law was clearly established at the time that entering a dwelling without first knocking and announcing, absent exigent circumstances, violates the Fourth Amendment of the Constitution. If the Defendants knowingly did not abide by this constitutional requirement they can be held liable.

In closing, the Court is cognizant that qualified immunity is an entitlement not to stand trial or face the burden of litigation, rather than a mere defense to liability, Gonzales, 325 F.3d at 1233, and therefore should be granted at the earliest possible point in the case, Id.; Parrish v. Nikolits, 86 F.3d 1088, 1094 (11th Cir. 1996). While the Court takes this responsibility seriously, because the Court finds that issues of fact remain with respect to the circumstances surrounding any failure to knock and announce, the Defendants are not entitled to qualified immunity at this time and their Motion for

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[11] At trial, the Defendants may argue alternatively that they are entitled to qualified immunity because their reliance was reasonable and request a special interrogatory verdict form at the charge conference. The Court may use these factual findings to grant qualified immunity at this point, as a mailer of law, if the jury's factual findings show that such immunity is warranted. See Priester v. City of Riviera Beach, 208 F.3d 919, 926 (11th Cir. 2000).

Summary Judgment must be denied.

III. CONCLUSION

Accordingly, for the foregoing reasons and because the Court finds that issues of fact remain as to whether a knock and announce actually occurred in this case, it is **ORDERED AND ADJUDGED** that Eric Goldestein [sic] and Erik Palacio's Motion for Summary Judgment [DE 139] is hereby **DENIED.**

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 12th day of May, 2008.

/s/ William P. Dimitrouleas
WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of record

APPENDIX F

F-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-60476-CIV-DIMITROULEAS
Magistrate Judge Rosenbaum

MARLENE WHITTIER, as Personal Representative for the Estate of ANTHONY DIOTAIUTO, deceased and individually,

Plaintiff,

vs.

CITY OF SUNRISE, a Municipality of the State of Florida, ANDRE BRUNA, individually, SEAN VISNERS, individually, DAVID BOYETT, individually, DANIEL KOBAYASHI, individually, ERIC GOLDSTEIN, individually, and ERIK PALACIO, individually,

Defendants.

ORDER GRANTING, IN PART, AND DENYING, IN PART, DEFENDANT DANIEL KOBAYASHI'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court upon Defendant Sergeant Daniel Kobayashi's Motion for Summary Judgment [DE 134]. The Court has carefully considered the Motion, Plaintiffs Memorandum in Opposition RE 156], Defendant's Reply [DE 172], Defendant City of Sunrise and Daniel Kobayashi's Concise Statement of Material Facts [DE 135], Plaintiffs Omnibus Statement of Material and Controverted Facts [DE 153] the parties attached exhibits and depositions and is otherwise fully advised in the premises.

I. BACKGROUND

On April 11, 2007 the Plaintiff Marlene Whittier *("Plaintiff")*, as Personal representative of her son Anthony Diotaiuto ("Diotaiuto"), and individually, filed a seven count Amended Complaint against Defendant Officers Eric Goldstein ("Goldstein"), Erik Palacio ("Palacio"), the City of Sunrise ("City"), Officer Sean Visners ("Visners"), Chief David Boyett[1] Officer Andre Bruna ("Bruna") and Officer Daniel Kobayashi ("Kobayashi") [DE 9]. Plaintiffs son was shot to death by a police SWAT unit executing a search warrant in the early morning of August 5, 2005.

Early in the morning on August 5, 2005, the SWAT team was briefed, and received an operational plan, before executing a search warrant. The target of the search warrant was the Whittier/Diotaiuto home, located at 8500 N.W. 24th Court, Sunrise, Florida. The operational plan utilized an eight (8) man SWAT team to execute the warrant, called for the team leader to knock and announce prior to entry and called for the deployment of a flash-bang distraction device[2] before entry. Kobayashi was the SWAT supervisor and team leader. The SWAT team was dressed in full SWAT gear with the word "police" written on their uniforms. All members of the

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[1] On August 20, 2007 the Court granted Defendant David Boyett's Motion to Dismiss [DE 54].

[2] A flash-bang distractionary device is a "light/sound diversionary device designed to emit a brilliant light and loud noise upon detonation. Its purpose is to stun, disorient, and temporarily blind its targets, creating a window of time in which police officers can safely enter and secure a potentially dangerous area." Boyd v. Benton County, 374 F.3d 773, 776 (9th Cir. 2004).

SWAT team had attended extensive training and had been instructed that flash-bang devices should not be thrown directly at individuals. Palacio and Goldstein made up the breach team and were responsible for forcibly opening the residence door if necessary. Officer Bruna was responsible for deploying the flash-bang device.

According to police allegations, Diotaiuto was a known drug dealer. Investigations into Diotaiuto's drug activity lead to the eventual issuance of a search warrant. Intelligence also revealed that Diotaiuto had a concealed weapons permit and carried a handgun on him at all times. Additional intelligence advised that he kept a loaded shot-gun in the master bedroom closet of his home. Based on this information, the warrant service was labeled "high risk" which the City defines as "involving acts of violence or potential acts of violence." The City utilizes a SWAT team in the service of all "high risk" warrants.

Just after 6:00 in the morning on August 5, 2005 the SWAT team approached the door of the Whittier/Diotaiuto household. According to the testimony of the officers, Kobayashi approached the door, knocked loudly several times and announced the presence of the Sunrise Police and the search warrant. Fourteen (14) police officers present at the scene testified that they heard Kobayashi knock and announce.[3] Only a single officer, Officer Bettencourt, did not

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[3] Defendant Officer Erik Palacio, Defendant Officer Eric Goldstein, Defendant Officer Sean Visners, Defendant Officer Andre Burna, Defendant Sergeant Daniel Kobayashi, Officer Kevin McDonnell, Lieutenant Charles vitale, Officer John Jaslowski, Detective Luis Castro, Detective Michael Calise, Detective Barry Schwartz, Officer Machelle Quinones, Officer Antoine

hear the knock and announce. Despite the fact that nearly every officer present heard a loud and forceful, knock and announce, not a single neighbor heard a knock or an announcement of the police presence.[4] At least three neighbors, Noreen Dows,[5]

Bennet and Officer Brooke Lebel all testified that they heard Kobayashi knock and announce.

[4] Defendant argues that the Plaintiffs witnesses fail the "personal knowledge" requirement of Rule 602 of the Federal Rules of Evidence. The Court agrees with the Plaintiff that their witnesses easily meet the personal knowledge requirement in testifying to events not perceived through one of the five senses. See Los Angeles Times Commc'ns, LLC v. Dept. of the Army, 442 F. Supp. 2d 880, 886 (CD. Cal. 2006). As more fully discussed below, the Plaintiff points to other cases where courts have permitted testimony by lay witnesses as to what they *did not* perceive. See e.g. Massasoit v. Carter, 439 F. Supp. 2d 463, 477 (M.D.N.C. 2006); Vathekan v. Prince George's County, 154 F.3d 173, 175-76 (4th Cir. 1998); Kopf v. Wing, 942 F.2d 265, 266 (4th Cir. 1991).

[5] Noreen Dows lives behind and diagonal to the Whittier/Diotaiuto household. Their back yards are kitty-corner to one another. Mrs. Dows woke up at approximately 5:15 a.m. and was having coffee on her back porch when she heard a loud sound like an electrical transformer blowing and saw a bright light. She then investigated and was told that the presence in the backyard was the Sunrise Police. Mrs. Dows then returned to her house where she heard a serious of popping noises. She did not hear anyone knock and announce and she testified in her deposition that she would have been able to hear an officer who loudly

Rudy Strauss[6] and Nicholas Spatafora[7] testified that they were listening and would have been able to hear such an announcement if it had occurred. In response, the Defendants seek to introduce testimony by their sound expert, based on

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announced himself at the Whittier/Diotaiuto front porch. She testified that she has previously heard conversations coming from the driveway and has even heard keys drop on the driveway.

[6] Rudy Strauss lives next door to the Whittier/Diotaiuto household. Mr. Strauss and his wife were standing at their window watching the officers lined up at the Whittier/Diotaiuto household. Mr. Strauss testified in his deposition that it is his opinion that he would have been able to hear a knock and announce, if one had occurred, he did not hear one. He only heard a loud bang and saw a flash like a flash bulb on a camera. Mr. Strauss' opinion did not change after he found out that he also did not hear the battering ram break down the Whittier/Diotaiuto front door.

[7] Nicholas Spatafora lives across the street from the Whittier/Diotaiuto household. On August 5, 2005, Mr. Spatafora was standing in his living room ironing his shirt when he heard three or four loud noise that sounded like someone was hitting his parked car with a bat. After about 15-20 seconds, Mr. Spatafora heard a series of sounds like a bunch of firecrackers going on inside the house. Mr. Spatafora testified that he heard no knock or announcement from the police and that had there been a knock and announce he would have heard it. He testified that he has heard even regular conversations coming from the Whittier/Diotaiuto driveway. The results of the expert's sound test did cause Mr. Spatafora to change his testimony.

sound tests taken during a re-creation of the alleged "knock and announce," suggesting that even if these neighbors had been paying attention, they could not physically have heard the knock and announce.[8] The Plaintiff vigorously disputes the accuracy of this evidence.

Next, the breach team was signaled by Sergent Kobayashi. Officer Goldstein operated the Halligan tool, which is pushed into the door frame and struck with a battering ram until the door opens. Officer Palacio operated the battering ram. Palacio and Goldstein testified that it took about 10-15 second to open the door. After he pried the door open, Officer Goldstein testified that he saw Diotaiuto sitting on the couch.

After the Defendants breached the door, Officer Bruna looked into the house,[9] did not see the Defendant, and deployed a flash bang distractive device in the direction of the back bedroom. When the SWAT team entered the house, Diotaiuto was standing in his boxer shorts staring at the police officers. Kobayashi yelled "get on the ground." Instead of complying with the police orders, Diotaiuto began running to the back bedroom of the house, where he kept his weapons. Defendants Bruna and Visners chased Diotaiuto to the back

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[8] Sound tests were conducted at Noreen flows' household and at Nicholas Spatafora's household, but not at Rudy and Jane Strauss' household. These sound tests were not taken at the same time of day, or under the same atmospheric circumstances, as the series of events at issue in this case.

[9] Despite the fact that the Plaintiff contests this fact, as discussed more fully below, she has advanced no evidence suggesting that the flash bang was thrown either blindly into the house, or intentionally at Diotaiuto.

bedroom, and Officer Visners kicked open the door and followed the suspect inside. Bruna and Visners testified that Diotaiuto grabbed his gun, racked it and pointed it at them. Both officers were yelling at Diotaiuto to put the gun down. Two rounds of shots were fired, and Diotaiuto was killed. The medical examiner and Plaintiffs own forensic pathology expert testified that on autopsy, the decedent showed no signs of injury from the distraction device. Instead, the decedent died from the fatal gunshot wounds fired by Officers Bruna and Visners. The instant lawsuit, brought by his mother, followed.

II. DISCUSSION

In Count II of the Complaint the Plaintiff alleges that Defendant Kobayashi violated Diotaiuto' s civil rights by entering his home without knocking and announcing the presence of police officers and by permitting or directing a flash-bang distractive device to be thrown either blindly or directly at Diotaiuto. In his Motion, Kobayashi argues that he is entitled to summary judgment because: (1) the admissible evidence in this case establishes that Defendant Kobayashi did knock and announce before entering the Plaintiffs residence; (2) the record is devoid of any evidence that Officer Bruna deployed the flash-bang device blindly or directly at Diotaiuto; (3) the record is devoid of any evidence showing that Kobayashi in any way authorized the blind deployment of a distraction device, or the deployment of such a device blindly or directly at Diotaiuto; (4) even if the flash-bang were deployed blindly or directly at Diotaiuto this is insufficient, as a matter of law, to establish a Fourth Amendment violation, or at the very least Kobayashi is entitled to qualified immunity because such a right was not clearly established at the time; and finally (4) since the shooting/deadly force is conceptually distinct from any prior

alleged violation, Kobayashi cannot be held liable for it. The Court will address each argument in turn.

A. Summary Judgment Standard

The Court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The stringent burden of establishing the absence of a genuine issue of material fact lies with the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The Court should not grant summary judgment unless it is clear that a trial is unnecessary, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), and any doubts in this regard should be resolved against the moving party, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

The movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp., 477 U.S. at 323. To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support the nonmoving party's case. Id. at 325.

After the movant has met its burden under Rule 56(c), the burden of production shifts and the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the

material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). According to the plain language of Federal Rule of Civil Procedure 56(e), the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings," but instead must come forward with "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); Matsushita, 475 U.S. at 587.

Essentially, so long as the non-moving party has had an ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its claim. Anderson, 477 U.S. at 257. "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party." Walker v. Darby, 911 F.2d 1573, 1577 (11th Cir. 1990). If the evidence advanced by the non-moving party "is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. 242, 249-50 (internal citations omitted). Consideration of a motion for summary judgment, however, "does not lessen the burdens on the non-moving party:

> the non-moving party still bears the burden of coming forward with sufficient evidence on *each element* that must be proven." Earley v. Champion Int'l Corp., 907 F.2d 1077, 1080 (11th Cir. 1990) (emphasis in original).

B. A Material Dispute of Fact Exists as to whether Defendant Kobayashi Knocked and Announced before entering.

The common-law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is an ancient one. See Wilson v. Arkansas, 514 U.S. 927, 931-32 (1995). The Defendant argues that the evidence in this case conclusively proves, as a matter of law, that Kobayashi knocked and announced before entering the Whittier/Diotaiuto residence to serve the search warrant. Defendant points out that fourteen (14) different officers present on the scene testified that a knock and announce occurred. The Defendant contends that this evidence is uncontroverted. Defendant further argues that the neighbors who testified that they did not hear a knock and announce are insufficient to create a genuine issue of material fact. Defendant bases this argument upon the statements of various witnesses that they were either sleeping, inside, or not paying attention at the time of the alleged knock and announce. Defendant also advances expert witness evidence suggesting that none of the neighbors would have been able to hear the knock and announce from where they were positioned even if they were paying close attention.

In response, the Plaintiff contends that a genuine issue of material fact remains with respect to whether the knock and announce occurred because not a single neighbor or witness heard it. Plaintiff points to at least three (3) witnesses who adamantly believe that they were paying attention, in close

proximity to the Whittier/Diotaiuto household at a quiet hour of the morning, and if such a knock and announce occurred, they would have heard it. The Court agrees that the Plaintiff has advanced sufficient evidence to create a triable issue of material fact.

Courts have held that the fact that witnesses who were in a position to hear something did not in fact hear it, would allow a jury reasonably to conclude that the something did not occur. See Vathekan v. Prince George's County, 154 F.3d 173, 180 (4th Cir. 1998) ("If a warning is not given, then a witness will not hear one. A juror could reasonably conclude that if certain witnesses did not hear a warning, then *no* warning was given, even if other witnesses testify to a warning."); Kopf v. Wing, 942 F.2d 265, 267-68 (4th Cir. 1991) (finding that the District Court improperly made determinations of material fact when it discounted civilian witness testimony that they heard no warning given before a police officer released his police dog.); Massasoit v. Carter, 439 F. Supp. 2d 463, 478 (M.D.N.C. 2006) ("In the end, viewing all of the evidence in the light most favorable to plaintiffs, Phelps was in a place where he could have heard Tomeny yelling for him to kill or shoot Butler and he did not hear this. In instances such as this, the Court cannot simply ignore the fact that a witness did not hear something that they should have heard.").

This case is much like the case in Sledd v. Linsday, 102 F.3d 282 (7th Cir. 1996), where the Seventh Circuit found that several triable issues of material fact remained with respect to whether the

Plaintiff had suffered a Fourth Amendment violation. In Sledd, the court credited the testimony of the "neighbors in the adjacent duplexes" who "also heard no 'knock and announce' prior to the officers' forced entry into the house." Id. at 286. The court eventually found that:

> [h]ere, there are jury issues on several crucial questions. First, the parties dispute whether the officers announced their presence and warned Sledd that they were police executing a warrant. The police officers have not claimed any exigent circumstances to exempt their actions from the usual 'knock and announce' rule. Sledd introduced testimony from a number of persons that no warnings were given and that the officers were not otherwise identifiable as members of the police department.

Id. at 288. Likewise, in this case the Plaintiff has introduced testimony that none of the neighbors home on the morning of the incident heard the police knock and announce, and that at least three (3) of these neighbors believe that they were in a position to have heard any such knock or announcement had either occurred. The Defendant may be able to discredit this testimony using his expert's testimony, or otherwise. However, this factual determination is one for the jury and not for the Court. Accordingly, the Court finds that material fact issues remain as to whether the Kobayashi knocked and announced his presence, as constitutionally required, before entering the Whittier/Diotaiuto household, and therefore his

motion for summary judgment must be denied on these grounds.[10]

C. Plaintiffs have advanced insufficient evidence to create a material issue of fact as to whether Kobayashi authorized the device to be deployed blindly or directly at Diotaiuto.

Next, the Defendant argues that even if Bruna did throw the device blindly or intentionally throw it at Diotaiuto, [11]the Plaintiff has provided insufficient

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[10] The Defendant for the first time makes a half-hearted argument that exigent circumstances were present. However, at the operational plan the testimony of the officers was that a knock and announce was to be executed. None of the officers testified in their deposition that exigent circumstances were present, instead each officer testified that the knock and announce did in fact occur. The record shows that the lights had been out at the Whittier/Diotaiuto household and it had been quiet for an hour. There is no evidence in the record to suggest that exigent circumstances developed at the scene.

[11] As more fully discussed in the Court's Order Granting in Part and Denying in Part Defendant Sean Visners and Andre Bruna's Motion for Summary Judgment, the record further does not support any conclusion that Bruna deployed the flash-bang in an unconstitutional manner. As evidence that Bruna is lying concerning whether he looked prior to deploying the flash-bang device, the Plaintiff points to Officer Goldstein's testimony that he saw Diotaiuto in the living room shortly before Bruna threw the device and that Officer Visners also saw

evidence to create a material issue of fact showing that Kobayashi authorized the device to be deployed in this manner. The Court agrees. For claims, such as this, under § 1983, a supervisor cannot be held liable merely because a subordinate violates another's constitutional rights. Gonzales v. Reno, 325 F.3d 1228, 1234 (11th Cir. 2003). "Instead, supervisory liability under § 1983 occurs either when the supervisor personally participates in the alleged unconstitutional conduct or when there is a causal connection between the actions of a supervising official and the alleged constitutional deprivation."

Diotaiuto shortly after Bruna threw the device. The fact that these officers saw Diotaiuto and Bruna did not does not mean that Bruna did not look at the portion of the room where he was instructed to throw the flash-bang. The evidence advanced by the Plaintiff is entirely insufficient to raise a genuine issue of material fact. The record shows that Diotaiuto showed no signs of injury, whatsoever, from the distraction device, suggesting that the device did not detonate within any dangerous proximity to Diotaiuto. Plaintiff also points to the fact that there is no specific passage in the written materials indicating that officers should not throw a flash bang blindly or directly at a subject, however, both Defendants Bruna and Kobayashi testified that the training Bruna underwent taught him that under normal circumstances this was an improper manner in which to deploy the device. Despite the fact that there is no evidence that the distraction device was deployed in an unconstitutional manner, and therefore no vicarious liability, City of Los Angeles v. Heller, *475* U.S. 796, 799 (1986), the Court will in an abundance of caution evaluate Kobayashi's supervisory liability.

Cottone v. Jenne, 326 F.3d 1352, 1360 (11th Cir. 2003). A causal connection is established where: "1) a 'history of widespread abuse' puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he or she fails to do so; 2) a supervisor's custom or policy results in deliberate indifference to constitutional rights; or 3) facts support an inference that the supervisor directed subordinates to act unlawfully or knew that subordinate would act unlawfully and failed to stop them from doing so." Matthews v. Crosby, 480 F.3d 1265, 1270 (2007) (citing Cottone, 326 F.3d at 1360). As the Eleventh Circuit has pointed out, the standard for holding a supervisor liable for the conduct of his or her subordinate is "extremely rigorous." Cottone, 326 F.3d at 1360. Accordingly, as Defendant points out, even if the distraction device were improperly deployed in violation of the decedent's constitutional rights, the law would not impose liability on Kobayashi absent a showing that he sanctioned, authorized, or ordered the improper deployment.

The evidence in the record shows that Kobayashi provided instruction concerning the proper deployment of distraction devices, instructing officers that they should not throw them at people and that they must look before throwing them. Both Kobayashi and Bruna testified that these were the instructions given to Bruna. Further, such instructions were given to SWAT team members during their eighty (80) hours of SWAT training at mandatory SWAT school, along with the mandatory yearly minimum of 130 hours of continuing SWAT education. Plaintiff provides nothing other than pure

conjecture and speculation to support her claim that Kobayashi can be held liable for any non-existent constitutional violation committed by Bruna. Because the evidence in the record that Kobayashi properly instructed Bruna with respect to the proper detonation of the distraction device is uncontroverted and the Plaintiff advances no evidence to show that Kobayashi was on notice that Bruna would act contrary to his instructions,[12] the Defendant's motion for summary judgment on the grounds of supervisor liability must be granted.

D. Even if Bruna deployed the flash-bang device blindly or directly at Diotaiuto, Kobayashi is nonetheless entitled to qualified immunity.

Despite the fact that the Court has already held that the record does not support any conclusion that officer Bruna threw the flash bang device either blindly or directly at Diotaiuto, the Court will, in an

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[12] While a supervisor's knowledge of prior incidents in which constitutional rights were violated can put him or her on notice of the need to take action to prevent further problems, Gold v. City of Miami, 151 F.3d 1346, 1352 n. 12 (11th Cir. 1998), the absence of prior problems, which is the situation the Court is confronted with in this case, is evidence that the supervisor was not on notice of the need to correct a problem. See Mercado v. City of Orlando, 407 F.3d 1152, 1158 (11th Cir. 2005) (supervisor not liable for subordinate's improper discharge of a bean-bag launcher since there was no evidence of prior misuse, and the supervisor could not reasonably anticipate misuse).

abundance of caution, address Defendant Kobayashi's qualified immunity claim. Defendant Kobayashi argues alternatively that *even if* the facts claimed by the Plaintiff were true, he would nonetheless be entitled to qualified immunity.

Qualified immunity is an entitlement not to stand trial or face the burden of litigation, rather than a mere defense to liability. Gonzales v. Reno, 325 F.3d 1228, 1233 (11th Cir. 2003). Whether a public officer is entitled to qualified immunity depends on the specific details of a case, and is a question of law for the Court. Tapley v. Collins, 211 F.3d 1210, 1215 (11th Cir. 2000). "The purpose of this immunity is to allow governmental officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, protecting from suit all but the plainly incompetent or one who is knowingly violating the federal law." Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002)(internal citations omitted). Under the doctrine, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Evans v. Hightower, 117 F.3d 1318, 1320 (11th Cir. 1997) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

In addressing claims of qualified immunity, the Eleventh Circuit applies the following two-part analysis. "First the defendant government official must prove that he was acting within the scope of his

discretionary authority when the alleged wrongful act occurred. If the defendant meets this burden, the plaintiff must then demonstrate that the defendant violated clearly established law based upon objective standards." Evans, 117 F.3d at 1320 (internal citations omitted).

Under the first step of the analysis, as the Court found in its Order Denying the Defendants' Motion to Dismiss [DE 52], "[u]nder this standard, Defendant Kobayashi, as a matter of law, was undoubtedly engaged in a discretionary function when [he] participated in serving the search warrant." at p. 4. No party disputes this.

Considering the second part of the qualified immunity analysis, the plaintiff must then demonstrate that the Defendants violated "clearly established law based on objective standards." Evans, 117 F.3d at 1320 (citing Hartsfield v. Lemacks, 50 F.3d 950, 953 (11th Cir. 1995)). "In order to meet this burden, the plaintiff must demonstrate that the contours of his right were sufficiently clear so that reasonable officers would have understood that their actions violated his rights." Evans, 117 F.3d at 1320 (citing Swint v. City of Wadley, 51 F.3d 988, 995 (11th Cir. 1995) and Anderson v. Creighton, 483 U.S. 635, 640 (1987)). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . , but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Anderson, 483 U.S. at 640 (internal citations omitted); see also Moniz v. City of Fort Lauderdale,

145 F.3d 1278, 1282 (11th Cir. 1998).

The analysis of whether a "clearly established law" was violated also has two steps. Holmes v. Kucynda, 321 F.3d 1069, 1077 (11th Cir. 2003). First, is the "threshold question" of whether the facts as alleged, viewed in the light most favorable to the Plaintiff, would establish a constitutional violation. Id. (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)). "If no constitutional violation is established, then the defendants prevail, and 'there is no necessity for further inquiries concerning qualified immunity." Id. (quoting Saucier, 533 U.S. at 201). However, if a constitutional right would have been violated under the plaintiffs version of the facts, the Court then must determine whether that right was clearly established. Id.

As the Defendant points out, courts have repeatedly upheld the use of distraction devices for high risk warrants so long as not deployed in a dangerous manner, around innocent bystanders, the elderly or small children. See e.g. United States v. Boulanger, 444 F.3d 76, 85 (1st Cir. 2006) (noting that "the police planned the search after determining that there were no children or elderly people in the apartment."); Molina v. Cooper, 325 F.3d 963, 973 (7th Cir. 2003) (considering the fact that the "flash bang devices were not used in the presence of Jackie or the children."); Wailer v. Citty of Danville, 212 Fed. Appx. 162, 166(4th Cir. 2006). These cases upholding the use of flash-bang devices include cases in the Eleventh Circuit. See e.g. United States v. Baker, 16 F.3d 854, 856 (11th Cir. 1994) (finding the

use of the distractionary device was appropriate where intelligence showed that the door was barricaded and two dobermans awaited inside). There is case law from other circuits holding that *under certain circumstances,* and despite the fact that a suspect was known to be armed or violent, the use of a flash bang device constitute a constitutional violation. However, those cases nearly all involve circumstances not present here; namely the presence of children, the elderly and innocent bystanders. See United States v. Jones, 214 F.3d 836, 838 (7th Cir. 2000) (finding in dicta that the use of the flash-bang device was unreasonable under the circumstances of the case because a 6-year-old child lived in the apartment); Boyd v. Benton County, 374 F.3d 773, 779 (9th Cir. 2004) (finding that the blind deployment of a flash bang device into a dwelling where multiple innocent bystanders were suspected to be present was unreasonable). At least one district court has held that it is unconstitutional to intentionally deploy a flash-bang device directly at a suspect. Taylor v. City of Middletown, 436 F. Supp. 2d 377, 378 (D. Conn. 2006). Accordingly, while the Court agrees that there are certain factual scenarios, not present here, where the deployment of a flash bang device could be unconstitutional, even under those sets of facts the Plaintiff has not cited to a single Eleventh Circuit case holding this use of a flash bang device to be unconstitutional. Belcher v. City of Atlanta, 30 F.3d 1390, 1400(11th Cir. 1994) (holding that non-binding authorities cannot settle the law in the Eleventh Circuit for purposes of qualified immunity). Accordingly, the Court finds that even under facts more favorable to the Plaintiff than those present

here, Defendant Kobayashi is nonetheless entitled to qualified immunity and his motion for summary judgment must be granted on these grounds.

E. Normal tort-law principles apply to damages flowing from any potential Fourth Amendment violation for failure to knock and announce.

Finally, Kobayashi argues that he cannot, as a matter of law, be held liable for the shooting death of Diotaiuto because he did not use deadly force against Diotaiuto. The Court thinks that Defendant's argument in this regard misses the point. As support for the proposition that he cannot be held liable for the death of Anthony Diotaiuto the Defendant cites to a string of cases holding that the "reasonableness of an officer's actions in creating the dangerous situation is not relevant to the Fourth Amendment [excessive force] analysis; rather reasonableness is determined based on the information possessed by the officer at the moment force is employed. Waterman v. Batton, 393 F.3d 471, 477 (4th Cir. 2005); see also Carter v. Buscher, 973 F.2d 1328, 1333 (7th Cir. 1992); Cole v. Bone, 993 F.2d 1328, 1333 (8th Cir. 1993). However, the failing in the Defendant's argument is that the Defendant is not charged with committing the constitutional violation of excessive force. Instead he is charged with the failure to knock and announce. The Plaintiff may claim as damages all of the results proximately caused by the Defendant's constitutional violation, if any. Jackson v. Sauls, 206 F.3d 1156, 1168 (11th Cir. 2000) ("Although § 1983 addresses only constitutional

torts, § 1983 defendants are, as in common law suits, responsible for the natural and foreseeable consequences of their actions."). "For damages to be proximately caused by a constitutional tort, a plaintiff must show that, except for that constitutional tort, such injuries and damages would not have occurred and further that such injuries and damages were the reasonably foreseeable consequences of the tortious acts or omissions in issue." Id. at 1168. Despite the fact that Kobayashi is not liable for "excessive force" applied to Diotaiuto, and nobody claims he is, he is liable for any reasonably foreseeable damages proximately caused by his prior constitutional violation.

III. CONCLUSION

Accordingly, for the foregoing reasons, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant Sergeant Daniel Kobayashi's Motion for Summary Judgment [DE 134] **GRANTED in part** and **DENIED in part;**

2. Summary Judgment is granted in favor of Defendant Kobayashi with respect to his supervisory liability claims in relation to the deployment of the flash-bang device;

3. Summary Judgment is denied with respect to all claims related to the failure to knock and announce.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 12th day of May, 2008.

/s/ William P. Dimitrouleas
WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of record

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-12900-AA

FILED
U.S. Court of Appeals
Eleventh Circuit
November 13 2009
Thomas K. Kahn, Clerk

MARLENE WHITTIER,
as Personal Representative of the Estate
of Anthony Diotaiuto deceased and
individually, ANDREW DIOTAIUTO,
Plaintiffs-Appellees,

versus

CITY OF SUNRISE, a Municipality of
the State of Florida, et al.,
Defendants,
ANDRE BRUNA, individually,
SEAN VISNERS, individually,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: EDMONDSON, BLACK and SILER,* Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

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* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit Judge, sitting by designation.

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-12836-AA

FILED
U.S. Court of Appeals
Eleventh Circuit
Nov 09 2009
Thomas K. Kahn, Clerk

MARLENE WHITTIER,
as Personal Representative of the Estate
of Anthony Diotaiuto deceased and
individually, ANDREW DIOTAIUTO,
Plaintiffs-Appellees,

versus

CITY OF SUNRISE, a Municipality of
the State of Florida, et al.,
Defendants,
ERIC GOLDSTEIN, individually,
ERIK PALACIO, individually,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: EDMONDSON, BLACK and SILER,* Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

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* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit Judge, sitting by designation.

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-12998-AA

FILED
U.S. Court of Appeals
Eleventh Circuit
Nov 09 2009
Thomas K. Kahn, Clerk

MARLENE WHITTIER,
as Personal Representative of the Estate
of Anthony Diotaiuto deceased and
individually, ANDREW DIOTAIUTO,
Plaintiffs-Appellees,

versus

CITY OF SUNRISE, a Municipality of
the State of Florida, et al.,
Defendants,
DANIEL KOBAYASHI, individually,
Defendants-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: EDMONDSON, BLACK and SILER,* Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

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* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit Judge, sitting by designation.

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No. 09-1104

IN THE

Supreme Court of the United States

MARLENE WHITTIER,

Petitioner,

v.

DANIEL KOBAYASHI, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT DANIEL KOBAYASHI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit Court of Appeals correctly determined that Sergeant Daniel Kobayashi had *arguable reasonable suspicion*, and thus qualified immunity, for a no knock entry at the home of Anthony Diotaiuto, who was known to: (1) be operating a narcotics distribution operation out of his home; (2) have a criminal record pertaining to illegal drugs; (3) possess numerous weapons in his home; (4) carry a firearm on him at all times; (5) use illegal drugs; (6) be unusually awake with lights on at 5:00 a.m. on the morning of the raid (despite having worked past midnight at a bar); and (7) have additional occupants in the home.

2. Whether the Eleventh Circuit's opinion, based solely and expressly upon the arguable reasonable suspicion standard for qualified immunity, creates a conflict with other Circuit Courts pertaining to exigent circumstances within the realm of criminal suppression hearings, and the actual reasonable suspicion standard.

PARTIES TO THE PROCEEDING

The parties to this proceeding are: Petitioner, Marlene Whittier; and Respondents, Daniel Kobayashi, Erik Palacio, Andre Bruna, Sean Visners and Eric Goldstein.

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STATEMENT OF THE CASE

Petitioner, Marlene Whittier, is the personal representative of the Estate of Anthony Diotaiuto, an individual who ran a narcotics sale and distribution operation out of his home in Sunrise, Florida. In addition to his narcotics sales and personal illegal drug use, Diotaiuto collected guns, possessed a concealed weapons permit, and was known to carry a weapon on his person, as well as have a shotgun in close proximity to his illegal drugs. A friend of Diotaiuto who gave deposition testimony in the case before the District Court referred to him as a drug dealer and drug user who associated with drug users, gangsters, gang-types and thugs — people who had a "street mentality," who wore baggy clothes, dreadlocks and spoke of "nigger this" and nigger that." (R-138, #33, pp.27-29, 49)

Diotaiuto's operation continued unabated until a neighbor informed the Sunrise Police Department of the neighborhood drug house. An investigation ensued, and the narcotics detective developed concrete evidence that Diotaiuto sold large quantities of illegal drugs, that he received shipments of marijuana by the duffel bag, and that people in his home regularly used cocaine. (R-138, #11, p.12; #36, pp.21, 38-41). In addition to the narcotics, the detective learned of multiple weapons in the home, that Diotaiuto carried a gun, and guarded his illegal inventory with a nearby shotgun. (R-138, #12, pp.22-23).

The City's comprehensive investigation included surveillance, and background checks on individuals seen going to and from the residence, many of whom stopped

there for a matter of minutes (i.e. long enough engage in a drug transaction). (R-138, #12, p.27). It was through this surveillance that the City developed a confidential informant, who ultimately made a controlled drug buy. This informant further corroborated information regarding the firearms throughout the home.

After obtaining a search warrant, the narcotics detective prepared an operational plan and presented it to his supervisor. The plan reiterated that sources had confirmed that the subject was a narcotics dealer who had a semi-automatic handgun, a shotgun, a prior drug-related arrest, and that there was another known occupant in the house. (R-137). At the command level, the threat assessment was reviewed and then classified as "high risk," which the City defines as "involving acts of violence or potential acts of violence." (R-137, Tab 6). The National Tactical Officers Association, a worldwide association of thousands of tactical officers, incidentally promulgates a threat assessment scoresheet which, like the City of Sunrise, would have rated the threat here in the ***highest possible risk category*** available (35 points or more) based upon this criteria: (1) prior drug-related arrest; (2) additional occupant in the home; (3) presence of a shotgun; (4) presence of a handgun; and (5) suspect uses illegal drugs. (R-137, Tab 7).

On the morning of August 5, 2005, two officers conducted pre-raid surveillance at Diotaiuto's home and observed a garage door open and lights on at approximately 5:00 a.m., something which was unusual for an individual that worked past midnight at a bar. (R-138, #2, pp.10-21). An hour later, the City's SWAT team lawfully entered the home pursuant to a warrant

and found Diotaiuto in the living room, standing and staring right at the officers, all of whom were attired in black shirts with the word "POLICE" emblazoned in large white letters. The SWAT commander, Sergeant Kobayashi, yelled "get on the ground." Rather than comply, Diotaiuto ran to the master bedroom of the house and into the closet where he kept his guns, electing an armed confrontation, instead of exiting through the door within his bedroom that led outside. (Pet. App. F-6). Two officers, Sean Visners and Andre Bruna, followed.

Once inside the bedroom, the officers observed Diotaiuto grab his gun, rack the chamber and point it at them while the officers (again, in plainly clear police attire) were yelling at him to put the gun down. Shots were fired when Diotaiuto refused to lower his firearm. (Pet. App. F-6). Diotaiuto fell to the ground, but still mustered enough strength to raise and point his gun at the officers again. He was then fatally wounded, ending an incident which to this day remains the only time in nearly 200 Sunrise SWAT operations where any injury at all resulted.

REASONS FOR DENYING THE PETITION

I. THE PETITION FAILS TO DEMONSTRATE CIRCUIT CONFLICT WITH RESPECT TO THE ONLY SALIENT ISSUE OF WHETHER REASONABLE OFFICERS COULD HAVE DISPENSED WITH A KNOCK AND ANNOUNCE, AND THEREBY BE ENTITLED TO QUALIFIED IMMUNITY BASED UPON ARGUABLE REASONABLE SUSPICION

The Petitioner seeks a writ of certiorari from the August 31, 2009 ruling of the Eleventh Circuit Court of Appeals which afforded Sergeant Daniel Kobayashi qualified immunity on Petitioner's knock and announce claim. This was based upon the irrefutable conclusion that *arguable reasonable suspicion* existed, and that a reasonable officer could have dispensed with a knock and announce when faced with the circumstances that Kobayashi encountered. These were not only that the subject, Anthony Diotaiuto, sold drugs, but also used them, had a criminal history, carried a concealed weapon on his person, and kept a shotgun in his bedroom near the drugs. Not only that, but surveillance of the residence at 5:00 a.m., just an hour before the warrant service, revealed Diotaiuto, a bartender who worked nights, awake at home with lights on, and a garage door open.

Despite these facts, Petitioner seeks review and incorrectly frames the issue as being whether the Eleventh Circuit's decision improperly creates a blanket exception to knocking and announcing in any case involving suspicion of guns and drugs. That is plainly

not the holding of the Eleventh Circuit. Petitioner's error is evident because the Eleventh Circuit did not even decide whether, in fact, dispensing with the knock and announce here violated the Fourth Amendment in the first instance. For this reason, its Opinion does not conflict with any other Circuit's jurisprudence, and certainly not with any of the decisions cited in the Petition. The Eleventh Circuit's opinion, instead, is firmly rooted in qualified immunity, a legal concept in which state actors are sometimes not liable for damages even when they have possibly violated civil rights.

Just last year in *Pearson v. Callahan*, 129 S.Ct. 808, 172 L.Ed.2d 65 (2009), the Court discussed qualified immunity in a case involving alleged exigent circumstances and narcotics. The Court reiterated that this doctrine protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 129 S.Ct. at 815 (*citing*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). "Qualified immunity balances two important interests — the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.* It protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 89 L.Ed.2d 271, 106 S.Ct. 1092 (1986). Notably, the protection applies even when an official errs with respect to facts and law. *Id.* (*citing*, *Groh v. Ramirez*, 540 U.S. 551, 567, 124 S.Ct., 157 L.Ed.2d 1068 (2004). As such, it is not uncommon for officers to be afforded qualified

immunity even if there is an underlying constitutional violation, something which this Court clearly contemplated when fashioning the second of the two-part test in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

The concept of knocking and announcing stems from the Fourth Amendment, which protects individuals from unreasonable searches and seizures. *U.S. Const. amend IV*. The reasonableness inquiry includes the common law principle that law enforcement officers should usually knock and announce their presence and then wait a reasonable time before entering. *Wilson v. Arkansas*, 514 U.S. 927, 931-34, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995); *Richards v. Wisconsin*, 520 U.S. 385, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997). The Court has recognized, however, that compliance is excused when officers have a "reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation fo the crime by, for example, allowing the destruction of evidence." *Richards*, 520 U.S. at 394. A "reasonable suspicion" is a "minimal level of objective justification." *U.S. v. Sokolow*, 490 U.S. 1, 7, 104 L.Ed.2d 1, 109 S.Ct. 1 (1989). This standard requires "more than an inchoate and unparticularized suspicion or hunch," but "considerably less than proof . . . by a preponderance of the evidence." *Alabama v. White*, 496 U.S. 325, 329-30 (1990).

Like the several criminal cases (in which the United States was a party) relied upon by Petitioner, the issue often arises in the context of a motion to suppress, in which *actual reasonable suspicion* to dispense with the

knock and announce is tested. That standard, however, makes no allowances for errors by those who are *not* plainly incompetent, those who do *not* knowingly violate the law, or for possible violations of law which perhaps have not been clearly established, as this Court has mandated *must* be considered in qualified immunity cases. *See, Malley, Harlow, supra.* Conversely, the Eleventh Circuit's opinion below, which makes those allowances, applies the correct analysis in affording qualified immunity to the Sunrise officers where they had *arguable reasonable suspicion* of exigent circumstances. (Pet. App. A-8); *Jackson v. Sauls*, 206 F.3d 1156, 1166 (11th Cir. 2000); *Brent v. Ashley*, 247 F.3d 1294, 1303 (11th Cir. 2001).

The standard of "*arguable* reasonable suspicion" or "*arguable* probable cause" (as opposed to actual probable cause) in qualified immunity cases, while notably absent from any argument in the Petition, is the test in the Eleventh Circuit and elsewhere. *See, Gil v. County of Suffolk*, 590 F.Supp.2d 360, 370 (E.D.N.Y. 2008) (*citing, Caldarola v. Calabrese*, 298 F.3d 156, 161 (2d Cir. 2002)) (noting that in qualified immunity cases, arguable reasonable suspicion and arguable probable cause apply instead of actual reasonable suspicion and probable cause); *Vondrak v. City of Las Cruces*, 535 F.3d 1198, 1207 (10th Cir. 2008); *Young v. Eslinger*, 244 Fed. Appx. 278 (11th Cir. 2007); *Baribeau v. City of Minneapolis*, 596 F.3d 465 (8th Cir. 2009); *Kauch v. City of Cranston*, 59 Fed. Appx. 350 (1st Cir. 2003); *Blaylock v. City of Philadelphia*, 504 F.3d 405 (3d Cir. 2007); *Payne v. City of Olive Branch*, 130 Fed. Appx. 656 (5th Cir. 2005); *Braun v. Baldwin*, 346 F.3d 761 (7th Cir. 2003). Stated another way, when taking the qualified

immunity defense into consideration (which the Petitioner here has not), the issue is not whether a reasonable officer ***would*** have found exigent circumstances, but whether a reasonable officer ***could*** have found them. *See, e.g.*, *Cortez v. McCauley*, 478 F.3d 1108, 1120 (10th Cir. 2007); *Humphrey v. Staszak*, 148 F.3d 719, 725 (7th Cir. 1998) ("arguable probable cause exists when a 'reasonable officer in the same circumstances and with the same knowledge . . . as the officer in question *could* have reasonably believed that probable cause existed in light of well-established law'"); *Young v. Eslinger*, 244 Fed. Appx. 278, 279 (11th Cir. 2007) ("when a law enforcement officer seeks summary judgment on the basis of qualified immunity, we determine only whether reasonable officers in the same circumstances and possessing the same knowledge as the Defendants could have believed that [reasonable suspicion or] probable cause existed"); *Thompson v. Mahre*, 110 F.3d 716, 722 (9th Cir. 1997) (*citing*, *Anderson v. Creighton*, 483 U.S. 635, 641, 97 L.Ed.2d 523, 107 S.Ct. 3034 (1987) ([officer's] defense does not require him to establish that he was correct in thinking that police would be met with force or evidence destroyed. All he needs is qualified immunity, which he has if a "reasonable officer could have believed [the forcible entry without announcement and opportunity to comply peacably] to be lawful, in light of clearly established law and the searching officers possessed.")).

Petitioner misses the mark when advancing that the Eleventh Circuit's decision creates tension with the

miscellaneous suppression of evidence cases proliferating her argument. Given that these are criminal actions, the concept of qualified immunity is not discussed or analyzed at all. Not only that, many of the cases upon which Petitioner relies uphold decisions to dispense with knock and announce based upon exigent circumstances, even where they were required to be *more than arguable*. For instance, in *U.S. v. Nabors*, 601 F.2d 1351 (6th Cir. 1990), the Sixth Circuit upheld the officers' no-knock entry since the subject had a criminal history, drugs and firearms, much like Anthony Diotaiuto. In *U.S. v. Spinelli*, 848 F.2d 26 (2d Cir. 1988), the Second Circuit held that the home of a gun-carrying narcotics dealer who seemed to be aware that officers were surveilling him (like the decedent here who was awake with his lights on at 5:00 a.m.) may be entered without knocking and announcing since doing so could result in violence or the destruction of evidence. Hence, although she claims Circuit conflict utilizing inapposite authorities lacking qualified immunity analysis, Petitioner fails to demonstrate any actual tension.

The fallacy of the Petition is never more apparent than where it claims that the Eleventh Circuit disregards *Richards* and creates a blanket exception in cases involving drugs and guns. No reasonable reading of the opinion below could lead to that conclusion, particularly since the *Whittier* court cites to *Richards* and expresses that it creates no such exception. The court instead based its decision on whether Kobayashi could have had arguable reasonable suspicion based upon a totality of

the circumstances in this case, never opining as to whether those exigent circumstances actually existed:

> Our inquiry is whether Kobayashi had arguable reasonable suspicion that exigent circumstances existed to justify a no-knock entry, and thus we specifically decline to address whether exigent circumstances did indeed exist under the facts of this case. In a footnote of its order denying the SWAT team leader's motion for summary judgment as to the knock-and-announce claim, the district court concluded no exigent circumstances existed. On appeal, we do not disturb this determination because the pertinent inquiry is not whether exigent circumstances *actually* existed, but whether a reasonable officer, acting under the same circumstances and possessing the same knowledge as Kobayashi, *could have believed* they did.

(Pet App. C-8, n.2) (emphasis in original). This note by itself refutes any notion that the Eleventh Circuit's opinion conflicts with any other Circuit's opinion on the issues argued by Petitioner, to wit: whether exigent circumstances were actually present.

Reliance upon inapposite decisions and inaccurately claiming that the Eleventh Circuit created a blanket exception to knocking and announcing (in certain cases) are not the Petition's only shortcoming. It also tellingly fails to demonstrate that any purported violation by the Sunrise officers here were in violation of clearly established law, the second part of the *Saucier* test. The

Court has said that an official is entitled to notice that his conduct is unlawful and to "fair warning" that his actions deprived another of a constitutional right. *Saucier*, 533 U.S. at 121. "For a constitutional right to be clearly established, its contours must be 'sufficiently clear that a reasonable official would understand that what he is doing violates the law." *Id.* (*quoting*, *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987)). The unlawfulness must be apparent. Toward that end,

> "in many — if not most — instances, the apparency of an unlawful action will be established by (if it can be established at all) preexisting caselaw which is sufficiently similar in facts to the facts confronting an officer, such that we can say every objectively reasonable officer would have been on 'fair notice' that the behavior violated a constitutional right.'"

Willingham v. Loughnan, 321 F.3d 1299, 1301 (11th Cir. 2003). While materially similar caselaw is not *always* necessary to give fair warning, if case law has not staked out a bright line, a plaintiff typically must show that the actions clearly exceeded a "hazy border" of acceptable conduct. *Loughnan*, 321 F.3d at 1303; *Hope v. Pelzer*, 536 U.S. 730, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002).

Importantly, the Eleventh Circuit Court of Appeals — the jurisdiction in which Sergeant Kobayashi serves as a law enforcement officer — has noted that "public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases" and

that law is clearly established for qualified immunity purposes only when it arises from the U.S. Supreme Court, the Eleventh Circuit Court of Appeals, or the highest court of the state. *Jenkins v. City of Talladega*, 115 F.3d 821, 825 (11th Cir. 1997); *Hamilton v. Cannon*, 80 F.3d 1525, 1532, n.7 (11th Cir. 1996). Hence, Sergeant Kobayashi was not charged with knowing the universe of interpretive decisions, and analyzing appellate decisions of criminal suppression hearings in Nebraska (*U.S. v. Lucht*); Iowa (*U.S. v. Marts*); Illinos (*U.S. v. Jones*); and New York (*U.S. v. Spinelli*). The federal district in which he served as an officer simply did not charge him with performing the wide-ranging analysis that Petitioner seeks to impose.

Even if Sergeant Kobayashi had undertaken a nationwide analysis, he would have discovered that exigent circumstances are analyzed on a case-by-case basis, and that courts from around the country invariably reach different results when interpreting different case-specific facts, all while uniformly adhering to the Court's prohibition of blanket exceptions in narcotics cases. *See, Richards v. Wisconsin*, 520 U.S. 385, 388 (1997). He too, in theory, would have concluded that given the requisite fact-specific inquiry, there was no clear notice that the Constitution required a knock and announce under the precarious situation he faced. In *U.S. v. Bynum*, 362 F.3d 574 (9th Cir. 2004), Bynum, who was convicted of being a felon in possession of firearms, challenged the officers' failure to comply with the "knock and announce" requirement when executing a search warrant. The involved officers had received information from a confidential informant that narcotics could be purchased from a home, which was later

determined to be Bynum's residence. The police initiated surveillance and relied upon a controlled purchase of drugs. In the course of the investigation, like in the instant case, the police learned that the suspect was armed with a weapon kept on his person. *Id.* at 577. After obtaining a search warrant, the police proceeded to Bynum's residence, detonated two distraction devices, opened the door with a battering ram, executed the search warrant and discovered contraband. Following an evidentiary hearing, the court found that the officers had a reasonable suspicion that knocking and announcing could pose a danger based upon Bynum's possession of weapons.[1] This determination was upheld without regard to qualified immunity which, again, affords officers considerable discretion and leeway by protecting all but the "plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092 (1986).

The Fourth Circuit applied similar reasoning in *Johnson v. City of Aiken*, 2000 U.S. App. LEXIS 3628 (4th Cir. 1999). There, the police utilized a SWAT team to enter into a home in which they suspected there would be drugs and a heavily armed drug dealer. After an adverse jury verdict, the officers appealed, claiming an entitlement to qualified immunity. The Fourth Circuit agreed since the conduct did not transgress "a bright line" which has been "authoritatively decided by cases of controlling authority" or where a consensus of cases

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1. The court explained that the exigency exception to 18 U.S.C. §3109 is measured by the same standard as applied to the Fourth Amendment reasonableness inquiry articulated in *Richards v. Wisconsin, supra.*

of persuasive authority necessitated "that a reasonable officer could not have believed that his actions were lawful." *Id.* at * 20. The court held that the officers had reasonable suspicion (a "minimal level of objective justification") to believe that exigent circumstances existed because they were to search the home of someone believed to be a "heavily armed drug dealer" that had "readily accessible firearms." *See also*, *U.S. v. Washington*, 340 F.3d 222 (5th Cir. 2003) (officers had reasonable suspicion of exigent circumstances where officers "believed that the suspect was selling drugs and was typically armed," despite knowledge that room to be searched lacked plumbing which could facilitate disposal of drugs); *Toliver v. Baxter County*, 2006 U.S. Dist Lexis 52976 (W.D. Ark. 2006) (reasonable to engage in no-knock entry based upon knowledge of drugs in home and that subject was involved with firearms); *U.S. v. Stevens*, 439 F.3d 983 (8th Cir. 2005) (no-knock entry was justified where the officers knew the house contained weapons and one of the occupants was considered dangerous); *Thompson v. Mahre*, 110 F.3d 716 (9th Cir. 1997) (reasonable officer could have believed that forcible entry was necessary to protect against armed resistance and destruction of evidence; qualified immunity exists even if judgment was mistaken).

Notably, the above opinions were rendered subsequent to this Court's 1997 opinion in *Richards v. Wisconsin*, and are not the result of any purported Circuit conflict or creation of a blanket drugs/guns exception in violation of *Richards*. Quite to the contrary, the opinions adhere to *Richards* but decide nonetheless that no-knock entries were allowed given that a showing of "reasonable suspicion" is not rigorous or high. *Richards*, at 394.

Here, where Kobayashi was faced with a warrant where the risk assessment fell in the highest possible threat category under the National Tactical Officer's Association matrix, and where the warrant was to be served upon: (1) a felony narcotics dealer; (2) who kept a semi-automatic handgun on his person; (3) who was otherwise heavily armed with additional weapons, including a shotgun near the drugs; (4) who could quickly dispose of contraband by keeping drugs in a bedroom with an interior toilet; (5) who had a prior drug-related arrest, (6) who resided with an additional occupant; and (7) who was unusually awake at 5:00 a.m., this ***could have*** led to objectively reasonable suspicion that a knock and announce might endanger the officers or inhibit their investigation of the drug-related activities.

For these reasons, Petitioner has not carried her burden of demonstrating that the Eleventh Circuit's Opinion conflicts with a decision of this Court or a Court of Appeals.

II. THE UNDERLYING ISSUE OF THE APPLICATION OF, AND EXCEPTIONS TO THE KNOCK AND ANNOUNCE REQUIREMENT HAVE BEEN ADDRESSED BY THIS COURT SEVERAL TIMES, MOST RECENTLY IN 2006, AND THE 11TH CIRCUIT COURT OF APPEALS PLAINLY ADHERED TO THAT LAW IN ITS DECISION; HENCE THERE IS NO ISSUE OF CRITICAL IMPORTANCE PRESENTED BY THE PETITION

Petitioner incorrectly claims that tension exists between the Eleventh Circuit and this Court's prior rulings, and that additional guidance should be provided. There is certainly no dearth of opinions from the Court on the knock and announce requirement, and the parameters of exigency to dispense with same. *See, Wilson v. Arkansas*, 514 U.S. 27 (1995); *Richards v. Wisconsin*, 520 U.S. 385 (1987); *Michigan v. Hudson*, 547 U.S. 586 (2006). As previously stated, there is also not the slightest indicia that the Eleventh Circuit's decision runs afoul *Richards*, creating a blanket exception to the knock and announce requirement in all cases involving drugs and weapons. To the contrary, the Eleventh Circuit, as stated above, specifically limited its opinion to qualified immunity under the arguable reasonable suspicion standard, and stayed in line with Supreme Court precedent quite expressly.

In addition, Petitioner has not shown that the Eleventh Circuit's opinion conflicts with any other Circuit analyzing whether to afford qualified immunity to an officer on alleged no-knock entry claim, under similar circumstances that Sergeant Kobayashi faced here.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

No. 09-1104

IN THE

Supreme Court of the United States

MARLENE WHITTIER, PETITIONER

v.

DANIEL KOBAYASHI, ERIC GOLDSTEIN,
ERIK PALACIO, ANDRE BRUNA, AND SEAN VISNERS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' GOLDSTEIN AND PALACIO BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether police officers are entitled to qualified immunity on a case-by-case analysis based on the totality of the circumstances to determine if arguable reasonable suspicion existed to justify a no-knock entry under the Fourth Amendment?

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JURISDICTION

The unpublished per curiam opinion of the U.S. Court of Appeals, Eleventh Circuit was entered on August 31, 2009. The Petitions for Rehearing and Rehearing En Banc were denied on November 9, 2009 with no Judge in regular active service on the Court requesting that the Court be polled. The Petitioner incorrectly cited the statute that invokes this Court's jurisdiction. Jurisdiction may be invoked pursuant to 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

In addition to the Fourth Amendment of the United States Constitution as cited by the Petitioner, this case also involves 42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia

shall be considered to be a statute of the District of Columbia.

STATEMENT

A. Execution of a "High-Risk" Search Warrant and Diotaiuto's Violent Threat to Officer Safety.

Early morning on August 5, 2005, SWAT team members including the Respondents were briefed before executing a "high-risk" search warrant. (Pet.App.B-3). Officers Goldstein and Palacio were provided with an operational plan as well as a "threat assessment" of Anthony Diotaiuto. (Pet.App.B-3). The Sunrise Police Department classified the warrant as "high risk" which the Department defined as "involving acts of violence or potential acts of violence." (Pet.App.B-3). Indeed, the execution of this high-risk warrant involved acts of violence when Diotaiuto did not comply with the police orders after their entry, racked his gun and pointed the semi-automatic pistol at the officers to shoot them. (Pet.App.B-4). Diotaiuto was shot by the officers, not Officers Goldstein or Palacio, in self-defense.

The "high risk" warrant was issued after a thorough law enforcement investigation of Anthony Diotaiuto, Petitioner's son. (Pet.App.B-3). The investigation commenced after learning from a neighbor, that Diotaiuto was selling large quantities of cannabis and cocaine from his residence. (Pet.App.B-2). As a result, the police conducted surveillance of the Whittier/Diotaiuto residence and completed a "controlled buy" of marijuana by a confidential

informant. (Pet.App.B-2). This revealed that Diataiuto carried a semi-automatic hand gun on his person "at all times" and kept a loaded shotgun in his bedroom closet. (Pet.App.B-2-3). Diotaiuto had a criminal history of marijuana possession and the police learned that he not only sold drugs, but used the drugs too. (Pet.App.B-2).

The operational plan to execute the search warrant called for an eight (8) man SWAT team. (Pet.App.B-3). The team leader was responsible for knocking and announcing the presence of the SWAT team prior to entry. (Pet.App.B-3). Officer Goldstein and Officer Palacio made up the breach team who were responsible for opening the residence door if determined necessary by the SWAT team leader. (Pet.App.B-3).

At approximately 6am in the morning, the team leader approached the Whittier/Diotaiuto door while Goldstein and Palacio, along with rest of the SWAT team were positioned "in the stack" about five to ten feet away. (Pet.App.B-3). Fourteen police officers present on the scene along the perimeter of the residence testified that they heard the team leader knock and announce Sunrise's presence. (Pet.App.B-3). However, no neighbor heard the police knock and announce despite claiming that they would have heard it. (Pet.App.B-4). The SWAT team leader signaled for Goldstein and Palacio to breach the front door. (Pet.App.B-4). Officers Goldstein and Palacio followed the order and pried the door open. (Pet.App.B-4). This permitted the SWAT team to enter into what would prove to be a life threatening and dangerous law enforcement operation with Diotaiuto armed and ready to open fire on the police.

B. Proceedings Below

The district court denied summary judgment to Officer Goldstein and Officer Palacio on the basis that "issues of fact remain with respect to the circumstances surrounding any failure to knock and announce" and found the Officers were not entitled to qualified immunity. (Pet.App.E-17). However, the Eleventh Circuit Court of Appeals found Goldstein and Palacio were entitled to qualified immunity even if there was a "no-knock" entry because a reasonable officer could have had "arguable reasonable suspicion" under the circumstances to dispense with the knock and announcement requirement. (Pet.App.B-7). Specifically, the Eleventh Circuit declined to address whether exigent circumstances existed under the facts and did not disturb the lower court's determination. (Pet.App.B-9). Instead, the pertinent qualified immunity inquiry involved: "whether a reasonable officer, acting under the same circumstances and possessing the same knowledge as Goldstein and Palacio, *could have believed*" exigent circumstances existed. (Pet.App.B-9). Despite Petitioner's contention, no "blanket exception" to the knock and announce requirement was created.

REASONS FOR DENYING THE PETITION

THE COURT SHOULD DENY CERTIORARI ON THE BASIS THAT NO CONFLICT EXISTS WITH ANY PRIOR DECISION OF THIS COURT OR THE CIRCUIT COURTS IN THE CONTEXT OF A QUALIFIED IMMUNITY ANALYSIS UNDER THE FOURTH AMENDMENT AND A LEGITIMATE LAW ENFORCEMENT NEED FOR AN UNANNOUNCED ENTRY.

I. Petitioner Mischaracterized the Holding of the Court Below Which is Consistent with This Court's Rule of law.

Whittier concedes in her Petition, that the lower court's conclusion was based on qualified immunity, but relies solely on criminal cases where the suppression of evidence is at issue. *See, e.g., Wilson v. Arkansas*, 514 U.S. 927, 115 S.Ct. 1914 (1995); *Richards v. Wisconsin*, 520 U.S. 385, 117 S.Ct. 1416 (1997), *Michigan v. Hudson*, 547 U.S. 586, 126 S.Ct. 2159 (2006). The Eleventh Circuit specifically concluded that Goldstein and Palacio were entitled to qualified immunity because a reasonable officer *could have* reasonable suspicion that knocking and announcing his presence would have been dangerous under the circumstances facing the SWAT team. (Pet.App.B-8). The inquiry to determine if qualified immunity would apply to the claim under 42 U.S.C. §1983 was based on whether there was arguable reasonable suspicion that exigent circumstances existed to justify a no-knock entry. (Pet.App.B-9). The Eleventh Circuit did not even address whether exigent circumstances actually existed in the case. This case involved a fact-intensive inquiry of reasonableness.

Importantly, a "blanket exception" was not created to the knock and announce requirement by the Eleventh Circuit's analysis of reasonableness under the Fourth Amendment. While this Court rejected a categorical exception to the knock and announce rule for all searches in "felony drug" cases in *Richards v. Wisconsin*, 520 U.S. 385 (1997), it nonetheless found that the actions of the officers were reasonable based on the circumstances. *See id.* at 388. This Court's rejection of the blanket exception was based in part on the "overgeneralization" that felony drug cases involve a threat of violence and the destruction of drugs. *Id.* at 396.

The holding below is entirely consistent with this Court's previous decisions including those cited by Petitioner. This Court has recognized that the "flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests". *Wilson v. Arkansas*, 514 U.S. at 934. In *Wilson*, this Court left "to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment." *Richards*, 520 U.S. at 387 *citing Wilson v. Arkansas*, 514 U.S. at 936. This is exactly what the Eleventh Circuit accomplished and determined qualified immunity was appropriate.

"In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence."

Richards, at 520 U.S. at 394. This standard is less than a probable cause showing. *Id.* The Court recognized, "[t]his showing is not high". *Id.* These facts are resolved with a "case-by-case evaluation of the manner in which a search was executed." *Richards*, 520 U.S. at 392.

Here, as the Eleventh Circuit noted, the "particularized and objective" basis for a reasonable officer to suspect the situation had a potential for violence and to believe exigent circumstances existed to justify a no-knock entry was based on: (1) Diotaiuto receiving and selling narcotics at his residence; (2) Diotaiuto's criminal history; (3) Diotaiuto carrying a concealed semi-automatic handgun on his person; and (4) Diotaiuto possessing a shotgun that he kept in his bedroom. (Pet.App.B-8). These particularized facts, and not over-generalized notions that "guns and violence go hand-in-hand with illegal drug operations" as the Petitioner suggests, established that reasonable suspicion of exigent circumstances could have existed.

The pertinent inquiry of qualified immunity in this case was whether a reasonable officer *could have* had reasonable suspicion under the totality of the circumstances that a threat of violence existed to justify a no-knock entry. (Pet.App.B-7). This inquiry is supported by a combination of prior U.S. Supreme Court precedent involving the Fourth Amendment's knock and announce requirement and qualified immunity cases.

In fact, this Court's qualified immunity cases establish that the doctrine of qualified immunity shields officers from suit for damages if "a reasonable officer could have believed" his or her actions were lawful, in

light of clearly established law and the information the officers' possessed. *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534 (1991). Even law enforcement officials who "reasonably but mistakenly" conclude that probable cause or reasonable suspicion is present are entitled to immunity. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 3034, 3040 (1987). The qualified immunity standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." *Hunter*, 502 U.S. at 229.

At the time of the execution of the search warrant, there was no case in the U.S. Supreme Court or the Eleventh Circuit, that clearly established a no-knock entry would be unconstitutional under these circumstances where the drug-selling suspect had a criminal history and was armed with two guns including a semi-automatic gun on his person. Like the *Wilson* Court stated, the respondent's knowledge of a semi-automatic weapon in possession and the suspect's criminal history could have been "necessary justification for the unannounced entry", but remanded for the lower court to make the determination of reasonableness. *Wilson*, 514 U.S. at 937.

The Eleventh Circuit's determination of reasonableness involved a fact-intensive analysis in this case. Exigent circumstances did not have to exist in order for qualified immunity to shield the Respondents from liability. Given the doctrine of qualified immunity, even if Goldstein and Palacio were mistaken in believing that exigent circumstances existed to dispense with the knock and announce requirement, liability would not attach. *See Hunter*, 502 U.S. at 229.

Furthermore, the Petitioner erroneously argues that the analysis of the Eleventh Circuit is in derogation of this Court's prior precedent that rejects a blanket exception to the knock and announce requirement. To the contrary, the lower court's reasoning provides particularized and objective facts known to the officers at the time of their entry. Petitioner incorrectly surmises that simply because the search involved drugs, guns would be present and the exception would be created. Moreover, the Petitioner's reasoning in arguing that individuals who exercise their Second Amendment right to carry or possess weapons waive Fourth Amendment protection is equally misplaced. The Petitioner failed to recognize the other facts present to establish reasonable suspicion other than gun ownership in the instant case. These include a criminal history, a valid "high-risk" search warrant, and the specific facts surrounding Diotaiuto's guns especially intelligence that he was armed "at all times". The Petitioner's argument is a mischaracterization of the holding and record below.

The Eleventh Circuit used the specific factual knowledge of the officers regarding Diotaiuto at the time of the search which could have made them believe Diotaiuto posed a threat to their safety in order to justify an unannounced entry. The Respondents maintain that there was a "knock and announcement" made by the SWAT team leader. However, even under the Petitioner's version of the facts, no constitutional violation occurred. Goldstein and Palacio's conduct was reasonable under the circumstances.[1] Accordingly,

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[1] Although, it was not addressed by the Eleventh Circuit in its unpublished opinion, Goldstein and Palacio also argued they were

qualified immunity was properly granted and the lower court's opinion was consistent with this Court's prior precedent and the Fourth Amendment. Certiorari review of this case should be denied.

II. The Application of the Proper Standard to the Facts of the Present Case Does Not Create a Sister Circuit Conflict.

The Petitioner's repetitive and uncompelling reliance on a majority of criminal cases is misplaced. Actually, the Eleventh Circuit decision does not conflict with the Second, Sixth, Seventh, Eighth, and Tenth Circuit Court of Appeals. The Petitioner's cases do not reflect an analysis under the proper standard utilizing qualified immunity in a 42 U.S.C. §1983 case. It is true that the Fourth Amendment requires officers to knock and announce. However, in qualified immunity cases in the context of a purported knock-and-announce violation, the court is to determine whether exigent circumstances *could have* reasonably existed, even if officers are mistaken, as opposed to finding whether those circumstances existed or not. This is the integral analysis that is absent from the majority of the cases used by the Petitioner.

Some of the Petitioner's cases involve the application of 18 U.S.C. §3109 and the exclusion of evidence with findings that the officers were excused from the statute's compliance under the totality of the

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entitled to qualified immunity on the basis that no precedential case existed that clearly established an individual constitutional duty by each police officer to knock and announce prior to entry when executing a search warrant. *See Hodge v. Laryisson*, 226 F.3d 642 (5th Cir. 2000).

circumstances. *See U.S. v. Nabors*, 901 F.2d 135 (6th Cir. 1990)(holding 18 U.S.C. §3109 was not violated upon police entry when defendant was a felon in possession of firearms, the safety of those in apartment was jeopardized, and the need to preserve narcotic evidence); *U.S. v. Spinelli*, 848 F.2d 26 (2nd Cir. 1988)(excusing officers' non-compliance with 18 U.S.C. §3109 where the suspect had a past history of firearm possession and knowledge of the officers' surveillance); *U.S. v. Jones*, 208 F.3d 603 (7th Cir. 2000)(finding §3109 was not violated based on fact that defendant was a dangerous felon in possession of a gun). There is no language in these circuit cases that suggest they would find the unannounced entry in this case unreasonable under the Fourth Amendment. Additionally, despite Petitioner's reliance on *U.S. v. Marts*, 986 F.2d 1216 (8th Cir. 1993) and *U.S. v. Lucht*, 18 F.3d 541 (8th Cir. 1993) the Eighth Circuit, more recently in *U.S. v. Stevens*, 439 F.3d 983 (8th Cir. 2006) affirmed a magistrate's conclusion that a no-knock search was justified upon the presence of drugs and a sawed-off shotgun.

The remainder of cases cited by the Petitioner involved §1983 cases, but they do not conflict with the Eleventh Circuit's decision under the qualified immunity standard. In *Molina ex.rel Molina v. Cooper*, 325 F.3d 963 (7th Cir. 2003) qualified immunity was granted where the officers knew the suspected drug distributor owned a weapon and had a violent criminal past. At no time, did the Seventh Circuit exclude the possibility of granting qualified immunity if any of those factors were not present. *See id.* Moreover, in *Jones v. Wilhelm*, 425 F.3d 455 (7th Cir. 2005) where a Fourth Amendment violation was found, the court held that a "drug raid alone" did not constitute a

"particularized" risk of evidence to warrant exigent circumstances. The *Wilhelm* case also involved a fatal defect in the warrant. *See id.* The *Wilhelm* case is distinguishable because Goldstein and Palacio had particularized facts about Diotaiuto and did not just conduct a drug raid. The Petitioner's last case, *Hernandez v. Conde*, 272 Fed. Appx. 663 (10th Cir. 2008), involved a warrant to search the wrong house which makes the case inapplicable to the current analysis.

Consistent among the Circuits and in accordance with this Court's prior rulings is that the knowledge of drugs present, as a blanket exception, is insufficient to establish a constitutional no-knock entry. *See supra.* In this case, the knowledge of Diotaiuto selling cocaine and marijuana are what led to an investigation. This investigation resulted in additional knowledge regarding his criminal record and possession of a semi-automatic handgun on his person at all times along with a loaded shotgun kept in his bedroom. The information possessed by the officers at the time the search warrant was executed is more than mere knowledge of Diotaiuto's drug enterprise, but particularized facts, including carrying a semi-automatic pistol on his person at all times, established a threat to their safety. In light of the events that occurred after the purported unannounced entry including Diotaiuto aiming his loaded gun at some of the officers, the police belief that exigent circumstances existed was reasonable.

None of the cases relied upon by the Petitioner support a conflict among the Circuits and the Eleventh Circuit decision. In fact, these cases show that the factual circumstances are evaluated on a case-by-case

analysis. That type of factually specific analysis is consistent with this Court's Fourth Amendment jurisprudence and qualified immunity cases. The Fourth Amendment's "touchstone is reasonableness", which is "measured in objective terms by examining the totality of the circumstances." *Ohio v.* Robinette, 519 U.S. 33, 39, 117 S.Ct. 417 (1996). In applying this test, this Court has "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *Id.* at 39. The Court should deny Certiorari review because there is no disagreement in the law to settle among the Circuits.

III. Preserving Qualified Immunity Protection for Law Enforcement Officers Where Exigent Circumstances Could Have Existed is an Important Public Policy to Maintain.

This Court has recognized qualified immunity for government officials where it was necessary to preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service. *See, e.g., Wood v. Strickland,* 420 U.S. 308, 319, 95 S.Ct. 992, 999 (1975) (denial of qualified immunity to school board officials "would contribute not to principled and fearless decision-making but to intimidation"). Qualified immunity protects government officials from civil liability for actions taken within their official discretion insofar as these actions do not violate clearly established statutory or constitutional rights of which a reasonable official would have been aware. *See Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727 (1982). It is not merely a defense to liability; rather, when applicable, qualified immunity protects

government officials from lawsuits and, hence, the burdens of litigation. *See Saucier v. Katz*, 533 U.S. 194, 200-01, 121 S.Ct. 2151 (2001). When presented with the defense of qualified immunity, courts must decide, in no particular order, whether a constitutional violation occurred and if the law was clearly established at the time. *See Pearson v. Callahan*, ___, U.S. ___, 129 S.Ct. 808 (2009).

In the present claim against Officers Goldstein and Palacio, these officers were "in the stack" during a para-military operation where the SWAT team was utilized to execute the "high-risk" search warrant. "[P]olice officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving." *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865 (1989). Any hesitation by the Respondents could have endangered officer safety. There was no clearly established law, despite the Petitioner's contention, indicative to the officers that an unannounced entry under the particularized facts known would violate the Fourth Amendment.

A manifest danger to the officers existed in the Whittier/Diotaiuto residence on the basis of: Diotaiuto's use and distribution of narcotics; his criminal history; the semi-automatic handgun on his person at all times; and the loaded shotgun he kept in his bedroom. These particularized facts entitled Officer Goldstein and Officer Palacio to qualified immunity. The circumstances made it objectively reasonable for any officer to believe there was a threat of violence while performing their duties. The legitimate interest in protecting officers from threats of violence should

compel this Court to leave the lower court's decision undisturbed as a matter of public policy.

The constitutional requirement to "knock and announce" under the Fourth Amendment remains intact as a result of the Eleventh Circuit's decision. It made findings of fact related to the defense of qualified immunity and the reasonableness that exigent circumstances could have existed. The denial of Certiorari is appropriate.

CONCLUSION

WHEREFORE, Eric Goldstein and Erik Palacio respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,
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No. 09-1104

Supreme Court, U.S.
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In The

Supreme Court of the United States

MARLENE WHITTIER,

Petitioner,

v.

DANIEL KOBAYASHI, ERIC GOLDSTEIN, ERIK PALACIO, ANDRE BRUNA, and SEAN VISNERS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENTS BRUNA AND VISNERS

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QUESTIONS PRESENTED

1. Whether there is no tension between the Eleventh Circuit's decision and prior rulings of this Court.

2. Whether the Eleventh Circuit's ruling in this case is not in direct conflict with decisions of several other circuits and review should not be granted as there is no split on this issue.

3. Whether resolution of this issue is not of crucial importance to civil rights plaintiffs, police officers, and third parties, as the issue has already been resolved by this Court.

PARTIES TO THE PROCEEDING

The parties to the proceeding are: Petitioner, Marlene Whittier, and Respondents, Daniel Kobayashi, Eric Goldstein, Erik Palacio, Andre Bruna, and Sean Visners.

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STATEMENT OF THE CASE

A. The events of August 5, 2005

During the early morning hours of August 5, 2005, Anthony Diotaiuto, a 23-year-old, well-known drug dealer raised his gun, pointed and aimed it at Andre Bruna and Sean Visners, two City of Sunrise, Florida SWAT team members, who, along with the remaining members of the SWAT team, had legally entered his residence to execute a "high risk" search warrant. When Anthony Diotaiuto pointed his weapon at them, he put both of them in fear for their lives.

Petitioner's version is totally without support. The actual events leading up to this confrontation are set forth below. Petitioner's version of the events in her Statement of the Case, is totally without factual support.

Anthony Diotaiuto was a known drug dealer who, with his mother, Marlene Whittier, resided in a house in the City of Sunrise, FL. He frequently used illegal drugs and also sold large quantities of illegal drugs from his house, in excess of felony limits. After Diotauito's neighbor, Mohammed got tired of the late night parties, constant coming and going of cars like a "7/11" store and the frequent use of cocaine and marijuana at the house next door to where he lived with his grandchildren, he decided to take action. On July 14, 2005, he reported Diotaiuto and the activities at his house to the Sunrise Police Department. Mohammed told Detective Calise that Diotaiuto received shipments of marijuana in duffel bags and

sold large quantities of narcotics from his house. Additionally, the detective was advised that people in Diotauito's house used cocaine. Rather than rushing with the investigation, Detective Calise commenced an orderly and textbook narcotics investigation.

First the Diotaiuto house was placed under surveillance and the officers noted numerous people going into and leaving the residence, many stopping for only a matter of minutes. Alexander Liebster, one of the visitors was found to be driving under a suspended driver's license, and after being stopped by officers, admitted to having purchased illegal drugs in a felony quantity from Diotaiuto. Liebster agreed to assist with the ongoing investigation and advised the police about Diotaiuto's drug sales and distribution operation, as well as the presence of firearms in the house. He also agreed to make a felony drug buy from Diotaiuto on July 29, 2005, while being electronically monitored by police. This controlled buy was successfully completed, and rather than a "suspicion that Anthony was selling drugs from his residence," the police had clear and convincing evidence that he was.

In addition to his involvement with the sale of narcotics, the police learned that Diotaiuto collected guns, and kept both a shotgun and a handgun in his home, in addition to possessing a concealed weapons permit.

With all of this evidence for support, Calise pursued a search warrant, seeking authorization for the seizure of, among other things, firearms, illegal

drugs, drug paraphernalia and other aspects of this criminal enterprise. On August 3, 2005, Judge John Frusciante signed a Search Warrant which not only authorized, but commanded the Sunrise Police Department to search the premises and vehicles thereon. Furthermore, Judge Frusciante authorized the warrant to be served at any time the City so desired, and further authorized the City to serve the warrant while the occupant(s) was/were home.

Detective Calise prepared a plan for executing the Search Warrant, which was reviewed by Lieutenant Charles Vitale. The plan was further reviewed at the command/supervisor level, where the threat assessment previously prepared was reviewed, discussed and analyzed. The Sunrise Police Department then classified the warrant as ***"high risk."***[1] The SWAT team had been informed by the informant of

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[1] It should be noted that the threat assessment matrix form approved by the National Tactical Officers' Association would have scored the Diotaiuto warrant in the highest risk category possible (35 points or more) based upon this criteria: (1) prior drug-related arrest; (2) additional occupant in the home (Diotaiuto's mother); (3) the presence of a shotgun; (4) the presence of a handgun; and (5) subject uses illegal drugs. It is important to note that the threat was actually greater than that known at the time the command staff decided to use SWAT since there were actually three (not two) firearms in the house, i.e., a .380 caliber semiautomatic handgun, a 12 gauge pump action shotgun and a .30-.06 caliber rifle, as well as an illegal PVC cannon, a BB pistol and an arsenal of over 100 rounds of ammunition.

weapons owned by Diotaiuto some of which, they were told, were located in his bedroom closet.

Prior to arriving at Diotaiuto's home, a briefing was held at the Sunrise Police Department, and the members of the SWAT in attendance were informed that their role was to serve a high risk search warrant.

According to the City of Sunrise's policy, warrants which are classified as ***"high risk"*** are served by the City's SWAT team. The officers on the City's SWAT team have received extensive training far in excess of that recommended.

Since the inception of the City's SWAT team in 1991, it has performed over one hundred operations, with varying tactics depending on the threat assessment. The incident in this case is the one and only time any member of the SWAT team has even discharged a firearm during an operation.

After the decision to utilize the SWAT team was made, an operations plan was prepared by the SWAT supervisor, Sgt. Daniel Kobayashi. The operational plan called for the team leader to knock and announce and for a distraction device to be deployed before entry.

During the early morning hours of August 5, 2005, the SWAT officers involved in the operation, with the exception of Sean Visners, who was briefed privately later, attended a briefing at the City substation. The SWAT officers reviewed their tactical

plan, which was to utilize high-risk tactics and to flood the house upon entry by making sure each room/entry was clear and safe.

In following the operational plan, and with officer safety in mind, Sgt. Daniel Kobayashi, the team leader, knocked and announced that the Sunrise Police were there to serve a search warrant in a manner that would notify any occupant in the house of the presence of the police.[2] Having received no response and after waiting for approximately 12-15 seconds, the breach team was called in to begin preparations for breaching the door. Since this particular door opened outward, there were several steps in the process, the first step being the breach team had to approach the door and ready their tools, which took about three seconds. Next a Halligan tool had to be placed into the door opening above the lock, which took about another two seconds. Lastly, once the tool was set, the battering ram had to be lifted and slammed up against the door. In this case, this was done approximately two-to-three times. In all, breaching the door generally takes over ten seconds.

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[2] While there is some dispute amongst the neighbors as to whether or not they heard the "knock and announce," or for that matter could have heard it, when it allegedly occurred at approximately 6:00 a.m., on the morning of August 5, 2005, investigation of this alleged conflict determined that the neighbors did not even hear the battering ram which broke down the front door, and thus would not have heard a "knock and announce."

Although there have been past occasions when individuals have come to the door prior to and during the process of a door being breached, generally with respect to drug dealers, they are too busy hurrying to dispose of and flush contraband and hide firearms when they learn that the police are about to enter. Here, Diotaiuto made no effort to answer the door, for approximately twenty-five seconds, from the initial knock and announce to the time the door was breached, after several seconds of officers pounding on it with a ram.[3] In fact, when the door was breached and the officer looked into the house and then threw a diversionary device, he saw no signs of Diotaiuto initially. The distraction device detonated in the rear/left of the living room, near the doorway to the decedent's bedroom.

After the distraction device detonated, the SWAT officers, dressed in full SWAT gear with the word "POLICE" printed clearly on their uniforms, began to enter the house. Upon entering the police found

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[3] Petitioner disputes the overwhelming evidence of a knock and announce by claiming that by using a battering ram to gain entry, the police used "an entry technique that is used only when there is the element of surprise; knocking and announcing would eliminate any surprise before the entry." (Pet. 2) There is no support for this in the record, simply because it doesn't make sense. Battering a door by ramming it could not possibly equate to "an entry technique that is used only when there is the element of surprise. . . ." It is more than likely the most plausible way of securing speedy entrance to a house through a locked door when, after the knock and announce is given, the resident does not open the door.

Diotaiuto in the living room near the wall unit to the right. According to Plaintiff's own expert, if Diotaiuto were in this location when the diversionary device detonated, he would have been, at an absolute minimum, six feet and possibly further from it at that time. Distraction devices do not cause injury at this distance. Thus, once again, there is no record evidence to support Petitioner's assertion at page 3, of her Petition that the flash-bang distraction device was detonated about six feet away from Diotaiuto, who stood in the first room of the house, or that he appeared shocked and disoriented when the police entered. Additionally, if there is no record evidence to support Petitioner's claims that Diotaiuto was six feet away from the distraction device when it detonated, there is certainly no record evidence to support Petitioner's claim that a flash-bang device was thrown "next to him", as alleged on page 4 of Petitioner's Petition.

Furthermore, both the Broward County Associate Medical Examiner, Marie Herrmann, M.D., and Plaintiff's own forensic pathology expert, Michael Baden, have confirmed that, on autopsy, the decedent showed no signs of injury, whatsoever, from the distraction device. At the close of the evidence herein, there was not one *scintilla* of evidence that either Diotaiuto or anyone else, for that matter, standing six feet from such a device when it detonated, sustained any injury from the device. In fact, Diotauito's actions

left no doubt that he was quite lucid at the time, able to coordinate, visualize clearly and hear.[4]

Diotaiuto looked right at the officers who were wearing full SWAT gear. There is no record support for Petitioner's statement that "The officers admitted that he appeared stunned, confused, and frightened." (Pet. 4). In fact, despite the fact that the police were yelling at him to get on the ground, he chose to ignore this request. Instead he ran to his bedroom closet where the officers knew he kept his weapons. He chose this route to procure weapons rather than leave as there were means available to him to exit his house, including the bathroom door in his bedroom, which opened on to the outside patio. Clearly, he was not attempting to leave the house and escape a home invasion.

Fearful for the safety of themselves and the other officers, Visners and Bruna decided to follow Diotauito and apprehend him in his bedroom, so that he could not arm himself with one of his guns, and jeopardize the lives of any of the officers.

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[4] There is no evidence that Anthony's behavior was consistent with that of a startled, blinded individual in fear for his life, desperately attempting to protect his home and family from unknown intruders, as alleged by Pet. 4 of her Petition. All evidence is to the contrary, including that of Petitioner's own experts, as set forth above.

Surprisingly, and despite Petitioner's unsupported claim that the distraction device caused him shock and disorientation, he ran straight for his bedroom door very deliberately and without any difficulty, not stumbling, or bumping into walls or furniture, entered his bedroom and, once inside, remembered to slam the bedroom door, in an effort to gain some sort of time advantage over the police who were pursuing him. He then made a right turn once past the door, ran past or jumped over his bed, made a left turn toward the closet and then another right turn into the closet, again without any difficulty. Before he was able to get into the closet, where he kept his arsenal of firearms, Visners kicked the bedroom door open and yelled "police."

Visners and Bruna, knowing full well from the pre-raid briefing and intelligence gathered that the closet was where Diotaiuto kept his weapons, commanded him not to come out of the closet with a gun. Diotauito again refused to comply and both Visners and Bruna heard the distinct sound of Diotauito racking his gun. Diotauito then appeared in the doorway of his closet with a semi-automatic handgun in his hands and pointed it at Visners. Fearing for his life, Officer Visners, who was located in a more advantageous position in front of Bruna, opened fire, aiming at center mass, shooting with the intent to immediately inflict fatal injuries with each shot. Visners had never before fired in the line of duty in over ten years as a police officer. With the first series

of shots, Diotauito either retreated into the closet voluntarily or went back because of gunshot wounds. The officers approached to insure that the threat had ceased and both observed Diotauito still with the gun rigid in his hand. Then, from a seated position in the closet, he began to raise the gun again, at which time Visners yelled repeatedly "drop the gun" and Bruna virtually yelled the exact same thing with some additional expletives included. Diotauito again disregarded the officers and continued to raise his gun at Visners. At this point the fatal shots were fired. Visners then stepped on Diotauito's hand and Bruna manually removed the gun and placed it out of Diotauito's reach. Interestingly enough, and contrary to Petitioner's suggestion at page four of the Petition, a total of only eleven shots were fired by both Visners and Bruna combined during the two exchanges they participated in, as verified by both the medical examiner and Petitioner's own forensic pathologist, Dr. Michael Baden. While some of the bullets entered, and then exited and then re-entered Diotauito's body, it is clearly an attempt to mislead this Court by stating that he "lay dead on the floor from approximately twenty-five gunshot wounds," without clarifying how many actual shots were fired. (Pet. 4).

An additional and noteworthy attempt to mislead this Court stems from Petitioner's statement that "[t]he officers themselves never claimed that there

were exigent circumstances justifying entering without knocking and announcing. They maintained that they had knocked and announced, though as mentioned above, there was strong evidence to the contrary." (Pet. 5). What Petitioner fails to mention, and one can only assume, deliberately omits, is that the officers' Motion for Summary Judgment was grounded on the doctrine of qualified immunity and the evidence in support of this Motion was that fourteen officers heard the knock and announce; that no neighbors heard it, but that even Petitioner's experts stated that they wouldn't have heard it. Even more important is that the officers presented testimonial evidence that even though the neighbors were of the belief that they would have heard a knock and announce had same occurred, when the knock and announce was recreated, the very same neighbors didn't hear it. Furthermore, the very same neighbors did not hear the battering ram, used just seconds after the knock and announce. Petitioner presented no evidence contrary to this, either by way of witness or expert testimony. Clearly, this is not "strong evidence" to the contrary, as suggested by Petitioner.

REASONS FOR DENYING THE WRIT

Petitioner has suggested that this Court should grant review for the following three reasons:

a) To resolve a clear split among the Circuits;

b) To resolve an apparent conflict with a prior decision of this Court, and;

c) To resolve an issue of national importance as to whether there is a blanket exception to the knock and announce requirement when the police have reason to believe that a weapon is lawfully present in a dwelling where a search is to occur.

As set forth the Petition should be denied because none of the Petitioner's reasons justify this Court's review.

I. There Is No Tension Between The Eleventh Circuit's Decision And Prior Rulings Of This Court.

Petitioner argues that this Court has been emphatic that the Fourth Amendment embodies the constitutional rule that unless there are exigent circumstances, police must knock and announce before entering a dwelling. *Wilson v. Arkansas,* 514 U.S. 927, 936 (1995). Citing to *Kyllo v. U.S.,* 533 U.S. 27 (2001). Petitioner goes on to argue that this is based on the importance given to the sanctity and privacy of the home under the Fourth Amendment. Then,

Petitioner claims the facts of this case supposedly are illustrative that the knock and announce requirement provides crucial protection for the safety of both police and residents, and when police enter without knocking and announcing, homeowners, impliedly such as Diotaiuto, may well mistake them for dangerous invaders and act accordingly in self defense.

However, to accept Petitioner's account of the issues and facts, one must turn away from the evidence in the record and view this case purely as a hypothetical situation. Even if one were to assume, that a genuine issue of material fact existed with respect to whether or not a knock and announce took place that is immaterial to the Eleventh Circuit's analysis. There is a total lack of evidence, or it simply cannot be said decedent mistook the fourteen members of the Sunrise Police Department SWAT team, who had the word **POLICE** printed across their chests, for "dangerous invaders." There is likewise a total lack of any evidence that the breaking down of the front door with a battering ram, deploying a distraction device which went off six or more feet from Diotaiuto caused him any injury such as confusion, deafness, or blindness, which inhibited his ability to understand the words "police" when it was yelled as the SWAT team entered the residence. There is no evidence justifying his running into his bedroom, going into his closet, racking his gun, ignoring shouts of "police" as well as numerous orders to drop his gun, and on two separate occasions,

aiming his automatic weapon at the police officers, to warrant the belief that he was acting in self defense.

Petitioner states there is a clear and obvious tension between the Eleventh Circuit's opinion in this case, which Petitioner urges creates a blanket exception to the knock and announce requirement in cases where police believe that drugs and weapons are present. *Richards v. Wisconsin*, 520 U.S. 388 (1997). Petitioner argues the *Richards'* Court rejects a blanket exception to the knock and announce in all drug felony cases where officers did not possess "specific information about the dangerousness, or the possible destruction of drugs in a particular case" *Id.* at 390.

In *Richards*, there was in fact a knock-and-announce at the motel room door, by police officers, dressed in plain clothes, and at least one, dressed as a maintenance man. *Id.* at 388. Richards opened the door with a chain lock on and when he saw and recognized the police he slammed the door in their faces and attempted to exit through a window. Richards claimed that the officers failed to knock and announce their presence prior to forcing entry into the room. The Wisconsin Court determined that exigent circumstances justifying a no-knock entry are always present in felony drug cases and further reasoned that the violation of privacy that occurs when officers who have a search warrant forcibly enter a residence without first announcing their presence is minimal, given that the residents would ultimately be without authority to refuse the police entry. *Id.* at 390. The *Richards'* Court, citing to *Wilson*

found that it recognized the knock-and-announce requirement could give way "under circumstances presenting a threat of physical violence," or "where police officers have reason to believe that evidence would likely be destroyed if advance notice were given." *Wilson* at 514 U.S. at 936, 115 S. Ct. at 1919. It is indisputable that felony drug investigations may frequently involve both of these circumstances. *Richards* at 392.

In *Richards*, this court determined that in order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime, for example, allowing the destruction of evidence. This Court explained this standard (as opposed to a probable-cause requirement), strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual. *Richards* at 394.

Clearly, this Court has adopted a standard different than that of probable cause with respect to the execution of a search warrant without a knock and announce by requiring "reasonable suspicion" that a knock and announce would result in danger, futility, or the destruction of evidence. In *Richards*, this Court agreed with the trial court and with Justice Abrahamson, where the circumstances in the case showed that the officers had a reasonable suspicion that Richards might destroy evidence if given further

opportunity to do so. Richards also argued that the officers' entry was unreasonable in that the Magistrate who signed the search warrant for his motel room deleted the portions of the proposed warrant that would have given the officers permission to execute a no-knock entry. This fact did not alter the reasonableness of the officers' decision, which must be evaluated as of the time they entered the motel room. Although, at the time the officers obtained the warrant, they did not have evidence sufficient in the judgment of the Magistrate to justify a no-knock entry.

In discussing *Richards,* and applying it to the instant case, the Eleventh Circuit noted that this Supreme Court rejected a categorical exception, which some courts created with respect to the knock and announce requirement in felony drug cases, based in part on the generalization that these cases often involve a threat of violence and destruction of drugs. To the contrary the Eleventh Circuit found that in *Richards*, this Court adopted a case-by-case approach for determining if law enforcement acted reasonably in entering a residence without first knocking and announcing: "In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." *Id.* at 394. In evaluating the facts at bar, the Eleventh Circuit found that Officers Bruna and

Visners were entitled to qualified immunity, despite the fact that the lower court determined they were not because of the existence of a genuine issue of material fact, i.e., whether or not the SWAT team knocked and announced. The trial court did not analyze the facts below in light of whether or not arguable reasonable suspicion existed, which would have warranted a finding of qualified immunity on the officers' behalf. The existence of arguable probable cause is sufficient to find that an officer is entitled to qualified immunity when the actual test is whether or not probable cause existed. *Von Stein v. Brescher*, 904 F.2d 572, 579 (11th Cir. 1990). Thus, like a finding of arguable probable cause, the Eleventh Circuit understandably found that when a reasonable officer would have had arguable reasonable suspicion, that knocking and announcing would have been dangerous under the circumstances facing the SWAT team herein, therefore, he was likewise entitled to qualified immunity.

In analyzing the circumstances facing the SWAT team, the Eleventh Circuit found that knocking and announcing would have been dangerous under either of the Petitioner's or Respondents' two scenarios, and in either event the two officers were entitled to a finding of qualified immunity, as arguable reasonable suspicion, like a finding of arguable probable cause, existed.

The Eleventh Circuit found that the circumstances facing the officers, *i.e.*, including serving a search warrant on the home of a suspected drug

dealer, who had ready access to firearms and occupied the premises that the SWAT team arrived at to serve the warrant justified the finding of qualified immunity. Indeed, based on the information available to the SWAT team, Diotaiuto (1) received and sold narcotics, including cocaine and marijuana, at his residence; (2) had a criminal history; (3) carried a concealed semi-automatic handgun on his person; and (4) possessed a shotgun that he kept in his bedroom. This information, the Court found, was contained in the SWAT team's operational plan and received and reviewed by the members of the team, provided a "particularized and objective" basis for a reasonable officer to suspect the situation had a potential for violence and to believe exigent circumstances existed to justify a no-knock entry.

The issue is not whether actual exigent circumstances existed or what the officers' subjective beliefs were as they stood in the stack outside Diotaiuto's front door because the officer's subjective beliefs regarding the circumstances are irrelevant to the qualified immunity inquiry. *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982); *Jackson v. Souls*, 206 F.3d 1156, 1165 (11th Cir. 2000). The standard for determining if qualified immunity applies, as reiterated by the Eleventh Circuit, is whether an officer violated clearly established law; this is an objective standard which does not include inquiry into the officer's subjective intent or beliefs. While it is true that on analysis, the trial court found in denying Respondents' Motion for Summary Judgment that no exigent

circumstances existed to justify a no knock and announce entry, that inquiry is irrelevant to the analysis. As the Eleventh Circuit stated " . . . the pertinent inquiry is not whether exigent circumstances *actually* existed, but whether a reasonable officer, acting under the same circumstances and possessing the same knowledge as Bruna and Visners, *could have believed* they did." *Jackson*, 206 F.3d at 1165.

The Eleventh Circuit also noted that it has held an officer is entitled to qualified immunity even when he reasonably, but mistakenly believes reasonable suspicion is present. *Brent v. Ashley*, 247 F.3d 1294 at 1393 (11th Cir. 2001). Thus, the Court found that it makes little sense to not afford the same protection to officers who, like Bruna and Visners, are sensitive to the rights citizens enjoy under the Constitution, initially, but mistakenly, believe the situation involves a constitutional protection, but later learn it does not.

Therefore, arguing that the Eleventh Circuit created a "blanket exception" to the knock and announce requirement of the Fourth Amendment for situations where drugs could be destroyed or weapons utilized is simply not supported by the record or the opinion at issue. All the Eleventh Circuit's opinion did was adopt the same reasoning that has been utilized in qualified immunity decisions for years, dealing with probable cause and arguable probable cause, by applying the same doctrine to reasonable suspicion and utilizing an additional subcategory of arguable

reasonable suspicion in determining the existence of qualified immunity.

II. The Eleventh Circuit's Ruling In This Case Is Not In Direct Conflict With Decisions Of Several Other Circuits And Review Should Not Be Granted As There Is No Split On This Issue.

Petitioner would have this Court believe that the decisions cited are in direct conflict with not only *Richards* but also decisions from five other circuits. Petitioner is incorrect. The decisions are in full accord with *Richards*.

As examples of conflict, Petitioner cites to a series of criminal cases dealing with Motions to Suppress based upon the Fourth Amendment. These cases conclusively are distinguishable from the instant case, and upon cursory review do not establish a direct conflict with the Eleventh Circuit's decision.

By way of example, in *United States v. Nabors*, 901 F.2d 1351 (6th Cir. 1990), the court ruled that once a knock and announce took place, the police could not immediately, within a split second, enter the suspect's apartment even though the officers identified themselves as police and had obtained a warrant to search for weapons and other evidence despite the officers' belief that Nabors was suspected of trafficking in narcotics. The *Nabors* Court determined that the police had violated 18 U.S.C. § 3109, a statute of no influence on this case. The

issue of qualified immunity was not before the *Nabors* Court and the decision of the Sixth Circuit in 1990 is not precedent to be considered herein. The issues decided in *Nabors* related to the suppression of evidence seized which is completely different than the civil court issue of arguable reasonable suspicion in determining qualified immunity. Just as importantly, and an obvious omission by Petitioner herein, is that the statute relied upon for comparison in the majority of the cases cited by Petitioner in her Petition deal with 18 U.S.C. § 3109, which does not apply to state officers executing state warrants. *United States v. Tavares*, 223 F.3d 911 (8th Cir. 2000); *United States v. Murphy*, 69 F.3d 237 (8th Cir. 1995); *United States v. Andrus*, 775 F.2d 825 (7th Cir. 1985); *United States v. Kennedy*, 32 F.3d 876 (4th Cir. 1994).

In *United States v. Spinelli*, 848 F.2d 26 (2nd Cir. 1988), another case inappropriately relied upon by Petitioner, the Court determined that the law enforcement officers who entered Spinelli's house without the requisite knock and announce under 18 U.S.C. § 3109 met both the objective and subjective criteria that was then necessary for such entry. Once again, in determining whether or not to reverse the lower court's denial of a motion to suppress evidence seized. The *Spinelli* Court upheld the lower court's decision that the evidence was properly seized. Of course, qualified immunity and the elements necessary to support this defense were not at issue in *Spinelli*.

Additionally, none of the remainder of the cases relied upon by Petitioner in an attempt to establish conflict jurisdiction pass the litmus test, as none answers the question presented to the Eleventh Circuit, i.e., whether the Respondents are entitled to qualified immunity. Rather the remainder of the cases cited by Petitioner are criminal in nature and deal with suppression of evidence, not civil liability when the officers have qualified immunity.[5]

III. Resolution Of This Issue Is Not Of Crucial Importance To Civil Rights Plaintiffs, Police Officers, And Third Parties, As The Issue Has Already Been Resolved By This Court.

This case does not present an issue that must be resolved by this Court to avoid confusion and uncertainty with respect to fundamental Constitutional rights.

The actual issue in this case is whether the Eleventh Circuit Court of Appeals correctly applied *Richards* to include arguable, reasonable suspicion in a no-knock and announce police entry to serve a search warrant.

This Court has properly determined that a no-knock and announce entry may be acceptable, and

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[5] The one case dealing with qualified immunity relied upon by Petitioner has absolutely nothing in common with this case. *Jones v. Wilhelm*, 425 F.3d 455 (7th Cir. 2005).

provide the basis for qualified immunity, when entry is based upon a reasonable suspicion or arguable reasonable suspicion of objectively exigent circumstances justifying immediate entry. The issue of whether law enforcement officers may be afforded qualified immunity is a particular, fact-specific case where, without first knocking and announcing their presence, and based upon objectively exigent circumstances they serve a search warrant for illegal drugs and evidence of drug trafficking at a residence occupied by an individual in possession of a number of firearms, has been addressed and resolved by this Court, and does not need to be revisited.

CONCLUSION

Based upon the evidence, law and argument presented above, the Petition for Writ of Certiorari should be denied.

Dated this 15th day of April, 2010.

Respectfully submitted,

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In The Supreme Court of the United States

MARLENE WHITTIER,

Petitioner,

v.

DANIEL KOBAYASHI, ERIC GOLDSTEIN, ERIK PALACIO, ANDRE BRUNA, SEAN VISNERS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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ARGUMENT

THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CLEAR SPLIT AMONG THE CIRCUITS, AN APPARENT CONFLICT WITH A PRIOR DECISION OF THIS COURT, AND AN ISSUE OF NATIONAL IMPORTANCE AS TO WHETHER THERE IS A BLANKET EXCEPTION TO THE KNOCK AND ANNOUNCE REQUIREMENT WHEN THE POLICE HAVE REASON TO BELIEVE THAT A WEAPON IS LAWFULLY PRESENT IN A DWELLING WHERE A SEARCH IS TO OCCUR.

A. The Respondents' Presentations of Facts Are Unsupported by the Record and Inconsistent with the Principle that on Summary Judgment Facts Are Construed in Favor of the Non-Moving Party.

The procedural posture of this case is an interlocutory appeal of the District Court's denial of the defendants' motion for summary judgment on the grounds of qualified immunity. The District Court found important issues of fact to be resolved by the jury, especially whether the police knocked and announced before entering the house of Anthony Diotaiuto and then shooting and killing him. The District Court explained that "a material dispute of fact exists as to whether [the defendants] knocked and announced before entering." (App. E-8 to Petition for Writ of Certiorari).

All of the respondents in their oppositions to certiorari present their version of the facts as if they

were established and true. They convert their allegations, which are vehemently disputed by the petitioner, into proven facts. For example, the District Court accurately states: "According to police allegations, Diotaiuto was a known drug dealer." (App. E-3). But respondents Bruna and Visners declare that was "a well-known drug dealer." (Brief in Opposition to Petition for Writ of Certiorari of Respondents Bruna and Visners at 1). They say that Diotaiuto "frequently used illegal drugs and also sold large quantities of illegal drugs from his house in excess of felony limits." (Id.) But this is the respondents' allegation; it is disputed and not established in the record. The warrant was to arrest him, but respondents present the facts as if he were convicted.

Most importantly, respondents present their version of what occurred on the morning of August 5, 2005, as if it were established truth. They assert that "Sgt. Daniel Kobayashi, the team leader, knocked and announced that the Sunrise Police were there to serve a search warrant." (Id. at 5). But this is exactly the issue on which the District Court found that there was a conflict of evidence and therefore a matter upon which summary judgment was inappropriate. The District Court noted that "[p]laintiff points to at least three (3) witnesses who adamantly believe that they were paying attention, in close proximity to the Whittier/Diotaiuto household at a quiet hour in the morning, and if such a knock and announce occurred, they would have heard it. The Court agreed that the Plaintiff has advanced sufficient evidence to create a

triable issue of material fact." (App. E-9). There is likewise a dispute between respondents and petitioner over what occurred when the police entered the house that morning.

The attempt by respondents to present their versions of the facts as if they were proven and established is inconsistent with the basic principle that courts of appeals are to review a district court's grant of summary judgment de novo, construing all facts in favor of the non-moving party. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Caiozzo v. Koreman,* 581 F.3d 63, 68 (2d Cir. 2009); *Atanus v. Perry*, 520 F.3d 662, 671 (7th Cir. 2008).

Indeed, the dispute over facts between petitioners and respondent point to the central issue presented by this case: Should the Court of Appeals have overruled the District Court's denial of the defendants' motion for summary judgment? *See, e.g., Michigan v. Fisher*, 130 S.Ct. 546, 552 (2009) (Stevens, J., dissenting) (urging deference to trial courts on a "close question of the reasonableness of an officer's actions.")

B. The Court of Appeals Decision that a No-Knock Entry is Reasonable When There Is Reason to Believe that Drugs and Weapons Are Present Raises an Important Issue for Review By this Court.

The United States Court of Appeals for the Eleventh Circuit reversed the District Court by concluding that it was irrelevant whether the police

knocked and announced because a reasonable officer could "suspect the situation had a potential for violence and to believe exigent circumstances existed to justify a no-knock entry." (Respondents' Goldstein and Palacio Brief in Opposition at 7.) Specifically, the Eleventh Circuit found that a no-knock entry was justified based on: (1) Diotaiuto receiving and selling narcotics at his residence; (2) Diotauito's criminal history; (3) Diotauito's carrying a semi-automatic handgun on his person; and (4) Diotauito's possessing a shotgun in his bedroom. (App. B-8).

In other words, the Court of Appeals said that because police reasonably believed that there were drugs and weapons present they acted reasonably when they entered without knocking and announcing first. The Court of Appeals said this explicitly when it observed that it has "repeatedly noted the dangerous and often violent, combination of drugs and firearms." (App. B-7). For this reason, the Court of Appeals said that it was "irrelevant" whether the police knocked and announced before entering. (App. B-7 at n.1).

In looking at the four factors identified by the Court of Appeals it is crucial to note that they are all about the presence of drugs and weapons in the home. As for the second factor, the prior criminal history, it was a non-violent marijuana possession misdemeanor seven years earlier when Diotaiuto was 16 years old. As for the third and fourth factors, the possession of a handgun and a shotgun, the most important fact is one denied by none of the respondents: Diotaiuto's ownership was entirely lawful. He had a

properly licensed handgun and a shotgun (which did not require a license).

Thus, this case clearly presents the issue of whether police are acting reasonably in entering a dwelling without knocking and announcing based on their belief that drugs and weapons are present. This is an issue not yet explicitly addressed by this Court, but that arises constantly.

In *Richards v. Wisconsin*, 520 U.S. 385 (1997), this Court held that the suspected presence of drugs does not justify entry of a dwelling without knocking and announcing. This case poses the question of whether a person permanently loses the protection of the Fourth Amendment's knock and announce requirement by exercising his or her Second Amendment right to own a firearm. Under the Eleventh Circuit's reasoning, any time police have reason to believe that there are drugs and weapons, they can enter without knocking and announcing. Although respondents claim that the Eleventh Circuit did not create a blanket exception but ruled on this case, its reasoning means that police can enter without knocking and announcing any time they believe that there are drugs and weapons present. This turns exercise of one's Second Amendment rights into a permanent waiver of a Fourth Amendment right. This Court should grant review to decide this important issue.

Respondents argue that the police acted reasonably in these circumstances because this was a "high

risk" situation. (Opp. Cert. of Respondents Bruna and Visners at 4; Opp. Cert. of Respondent Daniel Kobayashi at 2). But the only thing that made it high risk was the belief that drugs and weapons were present. In fact, the evidence in the record of this case shows that Sunrise Police Department's Vice, Intelligence and Narcotics Unit qualifies all of their entries to be "high risk." (Testimony of Anthony Bennett, Sunrise police officer, p. 32, lines 3-13.)

Respondents repeatedly emphasize that the Court of Appeals found that there was "arguable reasonable suspicion" (Opp. Cert. of Respondent Daniel Kobayashi at 4) and that thus qualified immunity was justified (Opp. Cert. of Respondents Goldstein and Palacio at 13). Of course, this is what the Court of Appeals held. But the issue in this case is whether it was reasonable for police to dispense with the knock and announce requirement solely based on the belief that there were drugs and weapons present. Whether this is phrased as "arguable reasonable suspicion" or "reasonableness" or "qualified immunity," the question is the same: under clearly established law, can the police enter a dwelling without knocking and announcing based on the belief that drugs and weapons are present? The Court of Appeals reversal of the district court was solely based on its conclusion that knock and announce is not required under these circumstances and that is the issue which this Court needs to resolve.

Quite importantly, respondents all ignore a crucial fact: everything that justifies an entry without

knocking and announcing was known to the police at the time that they obtained the warrant to enter Diotaiuto's home. Yet, they did not ask for or receive a "no knock warrant." The police knew when they requested and received the warrant that Diotaiuto had a prior misdemeanor conviction for marijuana possession, that they suspected him of having drugs, and that he lawfully owned weapons. But the police did not request a no-knock warrant. The issue is whether under these circumstances it is then reasonable for the police to enter without knocking and announcing. Petitioner urges this Court to grant review to clarify that it is clearly established that a no-knock entrance is not permissible under these circumstances and that the Court of Appeals erred in reversing the District Court and ordering dismissal of this lawsuit based on qualified immunity.

C. There Is a Conflict Among the Circuits on the Issue of Whether Suspicion of the Presence of Drugs and Weapons Makes it Reasonable for Police to Enter a Dwelling Without First Knocking and Announcing.

A number of other Circuits have found that there was a triable issue of fact in cases presenting exactly the issue that was to go to the jury in this case: whether police knocked and announced before entering a dwelling. *See, e.g., Vathekan v. Prince George's County*, 154 F.3d 173, 180 (4th Cir. 1998); *Sledd v. Lindsay*, 102 F.3d 282, 288 (7th Cir. 1996). The

Eleventh Circuit's ruling is in conflict with these decisions.

More importantly, a number of Circuits have ruled that the presence of drugs and weapons does not justify the police in entering a dwelling without knocking and announcing. *See, e.g., Hernandez v. Conde*, 272 Fed. Appx. 663 (10th Cir. 2008); *Molina ex rel. Molina v. Cooper*, 325 F.3d 963 (7th Cir. 2003); *United States v. Lucht*, 18 F.3d 541 (8th Cir. 1994); *United States v. Marts*, 986 F.2d 1216 (8th Cir. 1993); *United States v. Nabors*, 901 F.2d 1351 (6th Cir. 1990).

Respondents attempt to distinguish these cases on various grounds, such as that some of the cases involved suppression of evidence or the federal knock and announce statute (18 U.S.C. §3109). (Opp. Cert. of Respondents Bruna and Visners at 20-21; Opp. Cert. of Respondents Goldstein and Palacio at 11). But this misses the point: a number of Circuits have held, albeit in varying contexts, that police cannot dispense with the knock and announce requirement based solely on the belief that there are drugs and weapons. The Eleventh Circuit's ruling in this case is directly in conflict with these holdings.

Moreover, other Circuits have held in cases with the same procedural posture and remarkably similar facts that police officers do not act reasonably when they enter without knocking and announcing first. For example, *Jones v. Wilhelm*, 425 F.3d 455 (7th Cir. 2005), the court rejected the officers' claim that the

knock and announce requirement should be "excused on the basis of exigent circumstances in executing a search warrant at night on a suspected drug operation." Id. at 468. The Seventh Circuit emphasized that the warrant did not support a no-knock entry under those circumstances. There seems little doubt that this case would have come out differently if only it had been litigated in the Seventh Circuit.

All of these cases confirm the obvious: the issue often arises when police have to enter a home to execute a warrant and have the belief that there are drugs and weapons. The question for this Court to resolve is one seemingly decided by *Richards v. Wisconsin*: is this enough to justify entering without knocking and announcing?

CONCLUSION

Throughout their oppositions to certiorari, respondents attempt to demonize Anthony Diotaiuto by repeating innuendo and by asserting allegations nowhere supported in the record. Respondents present their version of the facts of what occurred on August 5, 2005, as if they were found by a jury or a trial court as opposed to merely asserted.

But the reality is that the police entered Diotaiuto's house at 6:00 a.m., where he was asleep in his boxer shorts. A few minutes later Diotaiuto had been shot 25 times by the police and killed.

Petitioner maintains that if the police had knocked and announced before entering, as this Court has required, none of his would have happened. Diotaiuto was startled by a large number of intruders coming into his home, as anyone would have been, and would have reacted very differently if only the police had knocked and announced first.

The District Court ruled that it was for the jury to decide whether the police had knocked and announced and whether they acted reasonably under the circumstances. The Court of Appeals reversed and said that the police acted reasonably, and thus were protected by qualified immunity, because they had reason to believe that drugs and weapons were present. This Court should grant review to decide whether those facts are sufficient to dispense with the knock and announce requirement.

Respectfully submitted,

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